

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of)	
)	
GAME SHOW NETWORK, LLC,)	MB Docket No. 12-122
Complainant,)	File No. CSR-8529-P
)	
v.)	
)	
CABLEVISION SYSTEMS CORP.,)	
Defendant)	

TO: Chief Administrative Law Judge Richard L. Sippel

**DEFENDANT’S MOTION *IN LIMINE* TO EXCLUDE PORTIONS OF THE
TESTIMONY OF HAL J. SINGER AND TIMOTHY BROOKS**

This Court should strike and exclude from trial those portions of the testimony of Complainant Game Show Network, LLC’s (“GSN”) experts, Hal J. Singer, Ph.D and Timothy Brooks, that relate to new analysis that should have been contained in their expert reports filed on November 19, 2012.¹

On October 15, 2012, this Court entered a Scheduling Order requiring GSN to file its “Final Expert Reports” by November 19, 2012 and Cablevision to file its “Final Expert Reports” by December 14, 2012 (“Scheduling Order”). GSN provided reports for two experts, Dr. Singer and Mr. Brooks. Both experts had been retained by GSN prior to the issuance of the HDO by the Media Bureau; in fact, both submitted declarations in the Media Bureau phase of the proceedings in late 2011 and early 2012.²

¹ See GSN Exh. 222 (Direct Testimony of Timothy Brooks); GSN Exh. 223 (Testimony of Hal J. Singer, Ph.D).

² See October 12, 2011 Program Carriage Complaint (attaching Brooks and Singer Declarations); January 17, 2012 Reply (attaching Brooks and Singer Reply Declarations).

Cablevision deposed those experts on the subject matter of their Final Expert Reports on January 29 and February 4, 2013.

Pursuant to the pretrial scheduling order entered by the Presiding Judge on February 28, 2013 (“Pretrial Order”), the parties each filed the direct testimony of their respective experts on March 12. Dr. Singer and Mr. Brooks submitted written direct testimony that expanded on their Final Expert Reports in two respects, one of which was contemplated by the parties and one of which was not and is the subject of this motion.

First, the Singer and Brooks testimony contained new material responsive to the expert reports submitted by Cablevision. Although the Presiding Judge’s October 15 Scheduling Order did not provide for rebuttal reports by GSN’s experts, the Singer and Brooks testimony responds in various places to criticisms leveled at the initial reports by Cablevision’s experts. The parties expressly discussed such limited additional testimony prior to submitting the Pretrial Order to the Presiding Judge; as a result, the Pretrial Order permits each side to file supplemental expert reports on March 19 to respond specifically to critiques from opposing experts.

The Singer and Brooks testimony, however, has been amplified in another way that was not agreed to by the parties or, we respectfully submit, permitted by the Pretrial Order. In particular, both experts offer new analyses in support of their initial opinions based on data or materials they had or could have obtained when they filed their Final Expert Reports, but apparently chose to exclude. Although GSN and its experts may have been dissatisfied with their original analyses, none of this Court’s Scheduling Order, the Pretrial Order, or basic principles of fairness allow them to have a “do-over” less than three weeks before trial. Allowing GSN’s experts to offer new testimony at this

late date would unfairly prejudice Defendants and undo the carefully considered scheduling orders that have governed these proceedings.

For these reasons, and for the further reasons set forth below, this Court should strike these unauthorized additions to and amendments of Dr. Singer's and Mr. Brooks' testimony, and limit their trial testimony to the topics and analysis contained in their Final Expert Report as well as their response to criticisms of their reports previously advanced by Cablevision's experts. For the convenience of the Presiding Judge, we attach to this motion as Exhibit "A" and Exhibit "B" respectively, annotated versions of Dr. Singer's and Mr. Brooks' testimony showing precisely which portions of their testimony should be excluded.

I. Dr. Singer Should Be Precluded From Offering Testimony Regarding New Analyses Supporting Opinions in His Final Expert Report

Dr. Singer's testimony improperly expands on his Final Expert Report by including analysis supporting his original opinions based on facts or data that he had or could have obtained prior to filing his Final Expert Report.

Dr. Singer's testimony contains multiple examples of analyses that he could have and should have presented in his Final Expert Report. For example, in his Report Dr. Singer performed a "Mahalanobis distance" analysis which he used to describe GSN's demographic "proximity" to other cable networks. Dr. Singer based this analysis on only 37 cable networks for which Nielsen demographic data is available.³ Now, in his written direct testimony, he expands his analysis to cover 101 networks, relying on data that he could have obtained prior to filing his report.⁴

³ See November 19, 2012 Expert Report of Hal J. Singer, PH.D ¶¶ 43-45 ("Singer Report").

⁴ See GSN Exh. 223 at ¶52.

Likewise, in his Report Dr. Singer performed a series of [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In his

testimony, Dr. Singer now amends his analysis to only look at data from [REDACTED]

[REDACTED]

Dr. Singer disclosed that [REDACTED] at
his deposition. At his deposition, he stated that, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Regardless of whether the data used by Dr. Singer in his new Mahalanobis analysis – or any of the other new analyses he is attempting to offer in his direct testimony – were actually in GSN’s possession at the time Dr. Singer drafted his Report, there is no reason whatsoever why Dr. Singer could not have obtained the additional Nielsen reports in time for submission of his Final Expert Report. All of the Nielsen data Dr. Singer now intends to offer at trial were available to GSN when he wrote his Report,

[REDACTED]

and it is no excuse to say that they did not provide it to him at the time he was drafting his Report. He should be barred from basing his conclusions now on data he could have obtained months ago.

There are multiple other portions of Dr. Singer's testimony that could have been included in his Final Expert Report and thus should be stricken for the same reason:

- New analysis of the [REDACTED]
- Expansion of his analysis of [REDACTED] by doing a new run of the same data he had in his original report to exclude weekend hours;¹¹
- A new table containing an analysis of the [REDACTED] and [REDACTED]
- Adding "context" to his analysis of [REDACTED] between GSN and WE tv using a more "granular database" that he likely had or could have obtained prior to filing his Final Report last November.¹³

Nor can these new analyses be fairly characterized as "rebuttal" to the reports of Cablevision's experts. Dr. Singer's efforts to characterize his new analysis as rebuttal cannot disguise the fact that it is merely an attempt to shore up the flawed opinions and arguments that he chose to include in his Final Expert Report. This testimony should therefore be excluded because it violates the Court's Scheduling Order, leaving Cablevision's own experts little time to analyze his work, and Cablevision's attorneys no opportunity to depose him on the basis for his conclusions.

¹¹ See *id.* at ¶¶ 5, 33.

¹³ See *id.* at ¶54.

For the convenience of the Presiding Judge, those portions of Dr. Singer's written direct testimony that should be stricken because they constitute new or expanded analysis offered in violation of the Scheduling Order are identified in Exhibit "A".

II. Mr. Brooks Should Be Precluded From Offering Testimony Regarding New Analyses Supporting Opinions In His Final Expert Report

Similar to Dr. Singer, Mr. Brooks' testimony also includes certain new analyses that violates the terms of the Scheduling Order. The most egregious example is at Paragraph 78 of his testimony where he acknowledges that he requested a new analysis of [REDACTED]

Yet this question – the appeal of GSN's programming to women – was at the very heart of his Final Expert Report, and the mere fact that Mr. Brooks seemingly forgot or overlooked an obvious analysis relating to one of his central issues does not excuse his violation of the Court's Scheduling Order. This testimony should be excluded.

Additional testimony by Mr. Brooks that should be excluded because it is untimely and violates the Scheduling Order includes:

- An analysis of whether [REDACTED]
- Expanding his analysis of [REDACTED] and [REDACTED]
- Adding an analysis of documents that he had been provided in discovery prior to his Final Expert report regarding [REDACTED]

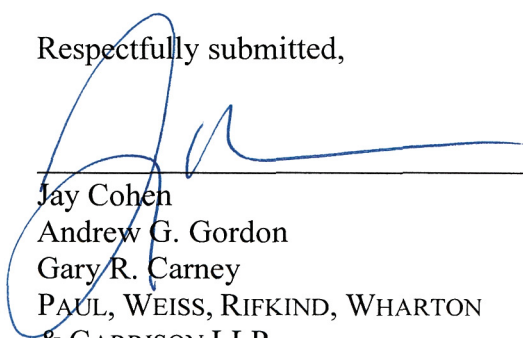
[REDACTED]

For the convenience of the Presiding Judge, those portions of Dr. Brooks' written direct testimony that should be stricken because they constitute new or expanded analysis offered in violation of the Scheduling Order are identified in Exhibit "B".

CONCLUSION

For the reasons set forth above, Cablevision respectfully requests that the Court exclude and strike from the record the portions of the testimony of Dr. Singer and Mr. Brooks identified in Exhibit A and Exhibit B of this motion.

Respectfully submitted,




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Exhibit A

Legend to Testimony of Hal J. Singer (GSN Exh. 223)

COLOR	Fed. R. Evid.
	New Analysis

**Before the
Federal Communications Commission
Washington, DC 20554**

GSN Exh. 223

In the Matter of)	
)	
Game Show Network, LLC)	MB Docket No. 12-122
v.)	File No. CSR-8529-P
Cablevision Systems Corp.)	

TESTIMONY OF HAL J. SINGER, PH.D.

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INTRODUCTION

1. I have been asked by counsel for Game Show Network, LLC (“GSN”) to address economic issues raised by the tiering policy of Cablevision Systems Corp. (“Cablevision”) vis-à-vis GSN, on the one hand, and Cablevision’s affiliated programming networks, including WE tv and Wedding Central, on the other. In particular, I have been asked to analyze from an economic perspective (a) whether Cablevision’s repositioning of GSN from a broadly distributed basic tier to a highly penetrated sports tier on Cablevision’s cable systems constitutes discrimination based on affiliation; and (b) whether Cablevision’s conduct has impaired GSN’s ability to compete vis-à-vis Cablevision’s affiliated, women’s programming networks for programming, advertisers, viewers, and multi-channel video programming distributors (“MVPDs”).

2. Based on my economic analysis, I have reached the following conclusions:

3. Cablevision gives preferential carriage terms to its affiliated programming networks. In particular, WE tv, which was wholly owned by Cablevision until July 2011,¹ is carried on Cablevision’s “Family Cable” tier.² Before it was shuttered, Wedding Central, which also was wholly owned by Cablevision, was carried on Cablevision’s “iO Package” tier (reaching [REDACTED] of subscribers).³ Before its July 2011 spin-off of AMC Networks, which operates the American Movie Classics (“AMC”), Independent Film Channel (“IFC”),

1. Before July 2011, Cablevision directly owned WE tv and Wedding Central. Following that date, it spun those networks off into a new company, AMC Networks, Inc., which has overlapping ownership and control with Cablevision. Although the events at issue in this case occurred when Cablevision directly owned WE tv and Wedding Central, this modified ownership structure does not eliminate economic incentives for Cablevision to favor affiliated channels.

2. Cablevision channel lineup, http://www.optimum.com/package_list.jsp?regionId=48&pkgType=1. See also GSN Exh. 90, [REDACTED].

3. Cablevision’s “iO Package” tier, also known as “iO \$10.95 & Above,” had [REDACTED] subscribers and Cablevision had a total of [REDACTED] subscribers. See [REDACTED], CV-GSN 0358220.

Sundance Channel, and WE tv cable networks,⁴ Cablevision carried AMC on its Family Cable tier (reaching [REDACTED] of subscribers),⁵ and it carried IFC and Sundance on its “iO Silver” tier (reaching [REDACTED] of subscribers).⁶ In contrast, GSN is carried on Cablevision’s “iO Sports & Entertainment Pak” tier (“S&E tier”), which reached just [REDACTED] of subscribers as of March 2010⁷ and can only be obtained by Cablevision’s subscribers for an extra \$6.95 per month.⁸ For these reasons, I conclude that Cablevision treats GSN less favorably than its affiliated cable networks, including WE tv and Wedding Central.

4. I next considered whether this disparate treatment amounts to discrimination. To an economist, the relevant inquiry is whether GSN and WE tv are “similarly situated,” as disparate treatment of similarly situated networks would indicate that Cablevision engaged in discrimination.⁹ GSN and WE tv have similar audiences [REDACTED]. Moreover, reality and game shows, particularly dating- or wedding-based programming focused

4. Hoover’s Company Profiles: AMC Networks Inc., <http://www.answers.com/topic/rainbow-media>.

5. Cablevision’s Family Cable tier, also known as “Digital” Exp. Basic, had [REDACTED] subscribers and Cablevision had a total of [REDACTED] subscribers. See [REDACTED], CV-GSN 0358220.

6. Cablevision’s “iO Silver” tier had [REDACTED] subscribers and Cablevision had a total of [REDACTED] subscribers. *Id.*

7. Cablevision’s “Sports Pak” had [REDACTED] subscribers, and Cablevision had a total of [REDACTED] subscribers). *Id.*

8. GSN Exh. 178 (“This package is now available to customers with Optimum Economy (where available), Optimum Value (Family Cable) or above with a digital cable box for only \$6.95 more per month.”).

9. Although there should be no requirement that two networks reside within the same genre to be considered similarly situated, it bears noting that the National Cable & Telecommunications Association (NCTA) used the same genre description for both GSN and WE: “General Entertainment, Other.” See NCTA, Cable Network Directory, <http://www.ncta.com/Organizations.aspx?type=orgtyp2&contentId=2907#&&CurrentPage=1> (last accessed Feb. 18, 2013). The NCTA used 15 separate categories of genres, and it attached two categories (General Entertainment and Other) to both GSN and WE tv. Of 291 national cable networks categorized by NCTA that appear on the basic (analog or digital) tier, only nine other non-premium cable networks received the same categorization as GSN and WE tv. These other networks were A&E, Adult Swim, Comedy Central, here!, The Horror Channel, LOGO, The N, IFC, and Viendo Movies. Cartoon Network shares its channel space with Adult Swim, “a late-night destination showcasing original and acquired animated and live-action programming for young adults 18-34.” Adult Swim Profile, <http://www.ncta.com/OrganizationType/CableNetwork/4155.aspx>.

on relationships (“relationship-based programming”), are key components of GSN’s and WE tv’s schedules.

5. Indeed, GSN rebranded its network in March 2004 from “Game Show Network” to “GSN” in part to accommodate introducing reality shows into GSN’s lineup.¹⁰ One of the significant programming moves associated with the rebranding was the introduction of *Fake-a-Date*, described by GSN as a “relationship game” featuring original *Joe Millionaire* Evan Marriott as host.¹¹ A significant share of GSN’s weekday-evening programming from October 2010 through September 2011—a window that includes the tiering announcement and the tiering event—was comprised of relationship-based programming.¹² One such program is called *Baggage*, which takes the form of a “dating game show.”¹³ Another GSN program, *The*

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10. See *Call Us 'GSN' From Now On ... Game Show Network Shortens Its Name to GSN*, PR NEWswire (Jan. 9, 2004), <http://www.prnewswire.com/news-releases/call-us-gsn-from-now-on---game-show-network-shortens-its-name-to-gsn-58885577.html> [hereinafter *Call Us 'GSN'*]. See also [REDACTED]

11. See *Call Us 'GSN'*, *supra* note 10 (“On Wednesday, March 17th at 10 p.m., GSN introduces its new lover meets faker competition, FAKE-A-DATE, hosted by ‘Joe Millionaire’s’ Evan Marriott. The unique *relationship game* features one lucky contestant paired up with two singles of the opposite sex.”) (emphasis added).

12. The term “relationship-based programming” is used by networks, scholars, and reviewers to describe this type of programming. See, e.g., Cosmo TV description, (“*Relationship-based programming* will focus on topics relevant to this audience and similar to the magazine: men, sex and relationships, delivered from a girlfriend point of view and offering a bird’s eye view into the lifestyle of the Cosmo Girl.”), available at http://www.novusnow.ca/print/lineup/full_lineup.php?type=15 (emphasis added); Sandra L. Calvert & Jennifer A. Kotler, “Lessons from children’s television: The impact of the Children’s Television Act on children’s learning,” *Applied Developmental Psychology* 24 (2003) 275–335, 291 (“Girls have historically liked *relationship-based television programs* more than boys, and since many of these programs focus on relationships, they may well find these programs more appealing than do boys.”) (emphasis added); Bob Hoover, “Book-to-film fame and fortune haven’t spoiled family man Michael Chabon,” *Pittsburgh Post Gazette*, Feb. 13, 2000, available at <http://old.post-gazette.com/magazine/20000213chabon7.asp> (“He’s signed with the cable network TNT to develop an hour-long drama. Chabon described it as ‘a *relationship-based program* about adults. It will be more socially and racially diverse than the shows on TV now.’”) (emphasis added); “NBC’s Summer Premiere Dates Set,” *TV Week*, (Mar. 2012) available at <http://www.tvweek.com/blogs/tvbizwire/2012/03/> (“The Jenny McCarthy-hosted *reality relationship program* ‘Love in the Wild’ returns for its second season on June 7 at 8 p.m. ET with a two-hour premiere.”) (emphasis added).

13. Cable Television Advertising Bureau, “GSN Profile,” available at <http://www.thecab.tv/php/networkprofiles/12profileData/2012pdf/12GSN.pdf> (“*Baggage*, a *dating game show* hosted by Jerry Springer, brings together three contestants and finds out how much emotional baggage people will put up with in order to find love.”) (emphasis added).

Newlywed Game, involves three newly married couples who “face off as they answer questions about their relationships....”¹⁴ [REDACTED]

[REDACTED]¹⁵ Similar to GSN, much of the programming on WE tv focuses on relationships. At least one WE tv network profile highlights the role of relationships in its programming.¹⁶ Two of WE tv’s shows in 2012 (*Braxton Family Values* and *Joan & Melissa: Joan Knows Best*) use “relationships” to describe their programming, and two others (*Marry Me in NYC* and *My Fair Wedding with David Tutera*) use “wedding” to describe their programming.¹⁷

6. Given these similarities in programming, it is not surprising to learn that the audience of GSN and WE tv exhibits significant overlap. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

14. *Id.*

15. See GSN Exh. 134, at CV-GSN 0270685 [REDACTED]

16. Proving Ground Media, Cable Network Profiles, We tv, http://www.pgmedia.tv/news_profiles.html (last accessed Feb. 18, 2013) (“This network [We tv] supports women and appeals to their interests in pop culture, *relationships* and personal style through programming that includes quality original series, unique movie packages and specials.”) (emphasis added). Indeed, of the approximately 120 cable network profiles kept by Proving Ground Media, only two networks—WE tv and Wisdom—contained the word “relationships” in their descriptions.

17. Cable Television Advertising Bureau, “WE tv profile,” <http://www.thecab.tv/php/networkprofiles/12profileData/2012pdf/12WEtv.pdf>. Prior wedding-themed shows on WE tv include *My Fair Wedding*, *Amazing Wedding Cakes*, *Bridezillas*, *Rich Bride*, *Poor Bride*, *I Do Over*, and *Big Easy Brides*.

18. “Both duplication” measures the likelihood of a viewer’s watching *both* networks conditional on her watching *either* network. As explained below, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

New
Analysis

7. The parties and their experts agree that measuring the lift in WE tv viewership following the tiering event is a reasonable test of whether WE tv and GSN are similarly situated.²⁰ And the data Cablevision has provided, while subject to certain limitations described below, show that WE tv [REDACTED]. In particular, after correcting for technical mistakes in Mr. Orszag's econometric model, I demonstrate that the more a household's viewership share of GSN declined from 2010 to 2011, the more its viewership share of WE tv tended to increase, suggesting that households do, in fact, tend to replace GSN viewership with WE tv viewership.

8. From the perspective of advertisers, both GSN and WE tv [REDACTED] audiences, permitting a similar demographic to be targeted. A distance

19. [REDACTED]

20. GSN Exh. 213, at 92: 8-12 [REDACTED].

analysis,²¹ which considers not just a network's gender but other demographic data compiled by Nielsen such as age and income, reveals that [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

9. Although, from an economic perspective, there should be no requirement that two networks carry the same programming to be considered "similarly situated," WE tv has competed directly with GSN for certain programming rights [REDACTED] [REDACTED]) and talent [REDACTED]).²² Also, [REDACTED] [REDACTED] to WE tv and GSN.²³ In addition, [REDACTED]

21. Distance analysis was popularized in a recent *New York Times*' bestseller on prediction models. See Nate Silver, *The Signal and The Noise: Why So Many Predictions Fail But Some Don't* 85 (2012) (explaining the use of a "nearest neighbor" analysis to project the future performance of minor-league baseball players by matching them to their closest analog in the past based on a vector of characteristics). Cablevision's economic expert, Mr. Orszag, also uses the distance analysis to determine whether WE tv and GSN are similarly situated. *Game Show Network, LLC v. Cablevision Systems Corp.*, Expert Report of Jonathan Orszag, December 14, 2012, ¶85 [hereinafter *Orszag Report*] ("Importantly, the Mahalanobis distance measure for various other network combinations show that they are close in Mahalanobis distance, as one would expect."). In contrast, Cablevision's industry expert, Mr. Blasius, criticizes my distance analysis as the stuff of pointed-headed academics: "In lieu of focusing on the more accurate measures of whether the two networks could be described as demographically similar, Dr. Singer instead offers a somewhat convoluted 'objective distance analysis' as subterfuge to draw parallels and force commonalities between the two networks that simply do not exist other than in obscure academic theory." *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of Lawrence Blasius, Dec. 12, 2011, ¶53, *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of Lawrence Blasius, Dec. 14, 2012, ¶57.

22. See GSN Exh. 53.

23. GSN Exh. 59; GSN Exh. 73 [REDACTED]

—were pitched to both networks.²⁴ That these rightsholders perceived GSN and WE tv to be reasonably interchangeable platforms for their talents and relationship-based programming also informs the similarly-situated analysis.²⁵

10. For these reasons, I conclude that GSN is sufficiently similar to WE tv to support a finding that Cablevision discriminated in favor of its affiliated networks and against GSN. Stated differently, a cable operator with no conflict of interest arising from affiliation would likely treat these two similarly situated networks alike with respect to how broadly to distribute the networks; because the networks are similarly situated, Cablevision’s preferential treatment of WE tv (and formerly of Wedding Central) likely demonstrates discrimination in favor of its affiliated networks and against GSN. The incentive of a vertically integrated cable operator to favor its affiliated networks has been widely recognized in the economics literature²⁶ and by the FCC.²⁷ Indeed, Cablevision has acknowledged the benefits of

24. In addition, Wedding Central planned to air GSN Exh. 76, at CV-GSN 0020343.

25. , CV-GSN 0267447.

26. See, e.g., David Chen & David Waterman, “Vertical Ownership, Program Network Carriage and Tier Positioning in Cable Television: An Empirical Study,” 30(3) *Review of Industrial Organization* 227-51 (finding that integrated cable systems carry their affiliated networks more frequently and carry unaffiliated networks less frequently, and that integrated carriers that do carry rival networks often position them on tiers having more limited subscriber access); Ayako Suzuki, “Market foreclosure and vertical merger: A case study of the vertical merger between Turner Broadcasting and Time Warner,” 27 *International Journal of Industrial Organization* 532, 533-34 (2009) (“Time Warner merely shifted its portfolio of channels in the basic bundle such that it was more concentrated on Turner Broadcasting channels.”). The literature also seeks to determine whether consumers benefit from the favorable treatment. See Tasneem Chitty, “Vertical Integration, Market Foreclosure, and Consumer Welfare in the Cable Television Industry,” 91(3) *American Economic Review* 428, 430 (2001) (finding that differences in consumer welfare across integrated and unintegrated markets—that is, local markets with and without a vertically integrated cable operator—were not statistically significant); David Waterman & Andrew Weiss, “The effects of vertical integration between cable television systems and pay cable networks,” 72 *Journal of Econometrics* 357–395 (1996) (finding that vertically integrated cable systems have carried their affiliated networks more frequently, and rival networks less frequently, than have systems without vertical ties).

27. Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees, *Memorandum Opinion and Order*, MB Docket No. 10-56, Jan. 20, 2011, ¶117 (“These conclusions are supported by the evidence set forth in the Technical Appendix that Comcast

[REDACTED]²⁸ And Cablevision was broadly distributing Wedding Central on its iO Package tier while Wedding Central struggled to achieve distribution by almost any other MVPD,²⁹ suggesting that Cablevision is willing to subsidize its affiliated networks.³⁰ That GSN was subjected to a higher standard than Cablevision’s similarly situated, affiliated networks—a “cost-benefit” test that appears to have been designed to produce a pre-determined outcome—exposes the discriminatory treatment.

11. In light of Cablevision’s favorable treatment of its affiliated networks over similarly-situated GSN, I examine whether an alternative (non-discriminatory) explanation better explains Cablevision’s carriage decisions. There are efficiency-based rationales, namely a network’s license fees or ratings, that might justify treating two similarly situated networks differently. Yet Cablevision does not appear to have been operating on the basis of a legitimate efficiency-based rationale. [REDACTED]

[REDACTED] Moreover, other MVPDs overwhelmingly carry GSN on more highly penetrated tiers than does Cablevision. And the record reflects that the [REDACTED]

[REDACTED].

may have in the past discriminated in program access and carriage in favor of affiliated networks for anticompetitive reasons.”).

28. See GSN Exh. 18 at CV-GSN 0134912 [REDACTED]

29. SNL Kagan, *Economics of Basic Cable Networks*, 2010 Edition, at 32 [hereinafter *Kagan Basic Cable*].

30. The record indicates [REDACTED]

33,

[REDACTED]; GSN Exh. 26, [REDACTED]

. See, e.g., GSN Exh. [REDACTED]

12. Even assuming that Cablevision applied some sort of cost-benefit test when it made the decision to reposition GSN, the selective application of any such test to an unaffiliated network (particularly if an affiliated network would have failed the same test) does not provide a valid efficiency justification. Rather, the selective application of a test based on affiliation is the very essence of discrimination. Here, it is clear that [REDACTED] [REDACTED] and very low penetration among other MVPDs, it is inconceivable that Wedding Central would have passed any sort of cost-benefit test applied to evaluate network value.³¹

13. As a direct result of its tiering policy, Cablevision prevents GSN from reaching approximately [REDACTED] Cablevision subscribers in the New York-New Jersey-Connecticut area. If Cablevision were to restore GSN to a tier that reaches nearly all of its digital subscribers—where it carries WE tv³²—then GSN would be restored to approximately [REDACTED] [REDACTED]³³ Cablevision subscribers who lost access to GSN in February 2011. Failure to secure broader carriage on Cablevision’s systems causes GSN to forgo significant license fees (of [REDACTED] per month per subscriber)³⁴ and advertising revenues.

14. Further, given the importance of the coveted New York market for advertisers, the growth that would accompany access to Cablevision’s digital subscribers would materially improve GSN’s ability to compete effectively for national advertising. A simple regression

31. Yet even as it tiered GSN, Cablevision [REDACTED] [REDACTED]. See GSN Exh. 83; GSN Exh. 183.

32. Wedding Central was carried on Cablevision’s iO Package tier.

33. [REDACTED] For the purpose of estimating going-forward damages, both here and later in my report, I use more recent data than the penetration data used in paragraph 3.

34. [REDACTED] See also [REDACTED], CV-GSN 0340609.

model shows that [REDACTED]

[REDACTED]

[REDACTED]. And Cablevision's carriage decisions are monitored by other cable operators, with the consequence that the deficit in GSN's distribution caused by Cablevision's discrimination is likely even larger, further impairing GSN's ability to compete for both advertisers and programming content.³⁵ Finally, I conclude that the harm to GSN owing to Cablevision's discriminatory tiering policy will likely redound to the harm of viewers. Cablevision's viewers are harmed by their inability to watch GSN without incurring an extra charge.

15. According to Cablevision's own economic expert, tiering a network would be discriminatory if the tiering were unprofitable for a vertically integrated MVPD's distribution business. The record reflects that Cablevision's distribution arm likely [REDACTED].

That Cablevision saved roughly [REDACTED]³⁶ in license fees that would otherwise be paid to GSN is irrelevant to the cost-benefit calculus, as Cablevision would have [REDACTED]. The costs to Cablevision of retiering GSN fall into two basic categories. *First*, approximately [REDACTED] customers called Cablevision to complain in response to GSN's retiering; by April 2011, Cablevision [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. [REDACTED]

36. *See* GSN Exh. 176, [REDACTED]

[REDACTED]

[REDACTED]

Second, to the extent that some households cancelled their Cablevision subscriptions as a result of the retiering, Cablevision incurred additional losses due to subscriber disconnects. Assuming conservatively that Cablevision's average revenue per subscriber per month for a GSN customer was approximately [REDACTED], with a [REDACTED], Cablevision would have sacrificed profits of approximately [REDACTED] per subscriber per month due to customer churn in response to GSN's retiering. I estimate that roughly [REDACTED] customers left Cablevision due to [REDACTED].

16. The foregoing evidence regarding Cablevision's [REDACTED] from the tiering episode supports an inference of discrimination in the sense that gains from an affiliated network may have been considered as an offset to any downstream losses. In addition, Cablevision's attempt to [REDACTED] [REDACTED]³⁷ is direct evidence of Cablevision's consideration of affiliation in its carriage decision of GSN.

QUALIFICATIONS

17. I am a Managing Director at Navigant Economics. My areas of economic expertise are antitrust, industrial organization, finance, and regulation. I have applied my

37. [REDACTED]

[REDACTED] See also GSN Exh. 111
; GSN Exh. 130 [REDACTED]

[REDACTED] ; GSN Exh. 137 [REDACTED]

[REDACTED] GSN Exh. 128 [REDACTED]

expertise to several regulated industries, including telecommunications, video programming, insurance, and health care.

18. I am the co-author of the e-book *The Need for Speed: A New Framework for Telecommunications Policy for the 21st Century* (Brookings Institution Press 2013), and of the book *Broadband in Europe: How Brussels Can Wire the Information Society* (Kluwer/Springer Press 2005). I have published a book chapter in *Economist Voice 2.0: The Financial Crisis, Health Care Reform and More* (Columbia University Press 2012); *Longevity Trading and Life Settlements* (John Wiley & Sons 2009); *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar Publishing 2006); and in *Access Pricing: Theory, Practice and Empirical Evidence* (Elsevier Press 2005),

19. I have published scholarly articles in many economics and legal journals, including *American Economic Review Papers and Proceedings*, *Berkeley Technology Law Review*, *Canadian Journal of Law and Technology*, *Federal Communications Law Journal*, *George Mason Law Review*, *Harvard Journal of Law and Technology*, *Hastings Law Journal*, *Health Affairs*, *Intellectual Property Law Bulletin*, *Journal of Business and Finance*, *Journal of Business Law*, *Journal of Competition Law and Economics*, *Journal of Contemporary Health Law And Policy*, *Journal of Financial Transformation*, *Journal of Industrial Economics*, *Journal of Insurance Regulation*, *Journal of Network Industries*, *Journal of Regulatory Economics*, *Journal of Telecommunications and High Tech Law, Policy and Internet*, *Regulation & Governance*, *Research in Law and Economics*, *Review of Network Economics*, *Telecommunications Policy Journal*, *Topics in Economics Analysis and Policy*, *University of Pennsylvania Journal of Business Law*, and *Yale Journal on Regulation*.

20. Five of my articles are of particular relevance to this proceeding: “Vertical Integration in Cable Networks: A Study of Regional Sports Networks,” *Review of Network Economics* (forthcoming 2013); “Review of Tim Wu’s Master Switch,” *Milken Institute Review* (January 2012); “Addressing the Next Wave of Internet Regulation: Toward a Workable Principle for Nondiscrimination,” *Regulation and Governance* (Vol. 4, No. 3, pp. 365-82, 2010); “Vertical Foreclosure in Video Programming Markets: Implications for Cable Operators,” *Review of Network Economics* (Vol. 6, No. 3, 2007); and “The Competitive Effects of a Cable Television Operator’s Refusal to Carry DSL Advertising,” *Journal of Competition Law and Economics* (Vol. 2, No. 2, pp. 301-31, 2006).

21. In regulatory proceedings, I have presented economic testimony in several forums, including the U.S. Federal Communications Commission, the U.S. Federal Trade Commission, the Antitrust Division of the U.S. Department of Justice, the U.S. National Highway Traffic and Safety Administration, the House of Commons of Canada, the Canadian Radio-television and Telecommunications Commission, and the U.S. Congressional Budget Office. My written testimony on the effect of telecom entry on video competition was cited extensively by the Department of Justice in a November 2008 report titled *Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers*.³⁸ I have advised the Canadian Competition Bureau on two matters concerning the video programming industry.

22. In program carriage disputes, I have served as an economic expert for the Tennis Channel, NFL Network and for MASN, which owns the television rights to live baseball games

38. Department of Justice, “Voice, Video and Broadband: The Changing Competitive Landscape and Its Impact on Consumers,” Nov. 17, 2008, available at <http://www.justice.gov/atr/public/reports/239284.pdf>.

of the Baltimore Orioles and the Washington Nationals. In a program access dispute, I served as an economic expert for DISH Network.

23. In addition to these cable-programming disputes, I have served as a testifying expert in several litigation matters. My experience as a testifying expert in litigation is summarized in my Curriculum Vitae, which is attached to this report.

24. Before joining Navigant Economics, I was president of Empiris, an economic consulting firm based in Washington D.C. Prior to that, I served as president of Criterion Economics, an economic consulting firm based in Washington, D.C., and I worked as a senior economist at LECG, an economic consulting firm based in Emeryville, California. In addition, I have worked as an economist for the Securities and Exchange Commission and the Army Corps of Engineers. I have taught economics at both Johns Hopkins (as a graduate student) and at Georgetown University (as an Adjunct Professor).

25. I earned M.A. and Ph.D. degrees in economics from the Johns Hopkins University and a B.S. *magna cum laude* in economics from Tulane University.

26. I file this report in my individual professional capacity. I have no financial stake in the outcome of this case.

I. CABLEVISION’S DIFFERENT CARRIAGE OF WE TV, WEDDING CENTRAL, AND GSN CONSTITUTES DISPARATE TREATMENT

27. Despite GSN’s lack of sports programming, Cablevision carries GSN on a little seen “iO Sports & Entertainment Pak” tier.³⁹ In contrast, Cablevision places its affiliated national cable networks—American Movie Classics (AMC), Fuse, Independent Film Channel,

39. Packages available at <http://optimum.com/io/pricing.jsp>. See also GSN exh. 178.

and WE tv—on a highly penetrated tier.⁴⁰ Table 1 shows the composition of Cablevision’s Sports & Entertainment Tier from October 2010 through September 2011.⁴¹

TABLE 1: NETWORKS ON CABLEVISION’S SPORTS & ENTERTAINMENT TIER
OCTOBER 2010-SEPTEMBER 2011

Network	Affiliation	On Other Tiers (as of 2Q 2011)
Versus	No	Digital Basic, iO Silver, iO Gold
MLB Network	No	Digital Basic, iO Silver, iO Gold
NBA TV	No	Digital Basic, iO Silver, iO Gold
GSN	No	
The Golf Channel	No	Digital Basic, iO Silver, iO Gold
ESPNU	No	Digital Basic, iO Silver, iO Gold
CBS College Sports	No	
Gol TV	No	
Tennis Channel	No	
ESPN Classic	No	
Outdoor Channel	No	
NHL Network	No	
Fox Soccer Plus	No	Digital Basic, iO Silver, iO Gold
TVG	No	
Big Ten Network	No	
Neo Cricket	No	
Fuel	No	
Mav TV	No	
Fox College Sports Pacific	No	
Fox College Sports Central	No	
Fox College Sports Atlantic	No	
Sportsman Channel	No	
Fight Now	No	

Sources: Affiliation is from 13th Annual Report, Appendix C, Table C-1. Cablevision

As Table 1 shows, *none* of the networks carried on Cablevision’s “iO Sports & Entertainment Pak”⁴² tier between October 2010 and September 2011 was affiliated with (or owned by) Cablevision. Indeed, GSN remains the only female-oriented, non-sports network on

40. Even in its early years, WE tv was distributed to approximately [REDACTED] of all Cablevision homes. See GSN Exh. 77; GSN Exh. 156.

41. Cablevision changed its pricing and packages on March 27, 2012. For example, the “Family Cable” tier is now called “Optimum Value” and includes WE tv, AMC, Fuse, and MSG. IFC and Sundance Channel are now listed on Cablevision’s “Optimum Preferred” tier. See Cablevision current packages, available at <http://www.optimum.com/digital-cable-tv/pricing.jsp> (accessed on Nov. 14, 2012). The new “iO Sports & Entertainment Pak” includes the following additional networks: NBC Sports Network, NFL Network, Red Zone and WFN. See Cablevision “Optimum Sports & Entertainment Pak,” available at <http://www.optimum.com/digital-cable-tv/sports/sports-pak.jsp> (accessed Nov. 14, 2012). See also GSN Exh. 178.

42. [REDACTED]

[REDACTED] See GSN Exh. 127; GSN Exh. 121.

Cablevision's iO Sports & Entertainment Pak tier.⁴³ To say that GSN is an unnatural fit for that tier is an understatement. In contrast, Cablevision's affiliated networks—including MSG, which is a sports network—are carried on a more widely distributed tier. For example, Cablevision-affiliated AMC, Fuse, and MSG were carried on "iO Family," and Cablevision-affiliated Sundance and IFC were carried on "iO Silver."⁴⁴ As of July 2010, Cablevision afforded greater

penetration to WE tv ([REDACTED]) than all but one of its distribution peers with over two million subscribers (Time Warner), including Comcast ([REDACTED]), DIRECTV ([REDACTED]), Dish ([REDACTED]), Cox ([REDACTED]), Charter ([REDACTED]), and AT&T ([REDACTED]).⁴⁵ And Cablevision carried Wedding Central when all but two distributors refused to carry the network [REDACTED].

28. The relevant comparison I focus on here is Cablevision's carriage policy for its wholly owned network, WE tv, on the one hand, and for GSN, an unaffiliated network, on the other. Placing WE tv on its Family Cable tier (and, when it was in existence, Wedding Central on its iO Package tier) while relegating GSN to the iO Sports & Entertainment Pak tier constitutes evidence of disparate treatment. That WE tv is similarly situated to GSN—a point to which I turn in the next section—suggests that this disparate treatment constitutes discrimination in an economic sense.

43. [REDACTED] See GSN Exh. 122 [REDACTED]

[REDACTED] CV-GSN 0298226-27, at 226.

44. [REDACTED], CV-GSN 0149337, [REDACTED]

45. CV-GSN 0258490; CV-GSN 0259605; CV-GSN 0259607.

II. GSN IS SIMILARLY SITUATED TO WE TV AND WEDDING CENTRAL

29. Having established above that Cablevision treats GSN differently from its affiliated women's programming networks with respect to tiering, the next step is to determine whether GSN is similarly situated to Cablevision's affiliated networks. To an economist, disparate treatment of two similarly situated subjects implies discrimination in the absence of a legitimate efficiency rationale.

30. Before addressing that the networks are similarly situated, I give a brief description of each network.

- **GSN:** GSN was launched in 1994. It was projected by SNL Kagan to charge MVPDs [REDACTED] per sub per month by 2011. At that time, GSN received [REDACTED] in license fees from Cablevision.⁴⁶ GSN is owned by DIRECTV and Sony.⁴⁷ In 2011, [REDACTED]⁴⁸.
- **WE tv:** WE tv was launched in 1997.⁴⁹ WE tv was projected by SNL Kagan to charge MVPDs [REDACTED] per sub per month license fee in 2011. In 2011, WE received [REDACTED] per sub per month from Cablevision.⁵⁰ Until July 2011, WE tv was wholly owned by Cablevision.⁵¹ In 2011, [REDACTED]⁵².
- **Wedding Central:** Wedding Central was launched by Rainbow Media, a subsidiary of Cablevision, in 2009.⁵³ Wedding Central was projected by SNL Kagan to charge MVPDs [REDACTED] per sub per month by 2011. Wedding Central was wholly owned by Cablevision.⁵⁴

46. [REDACTED]

47. *Kagan Basic Cable* at 321.

48. SNL Kagan, Basic Cable Networks by Subscriber, 2012.

49. *Kagan Basic Cable* at 19.

50. [REDACTED]

51. SNL Kagan, Basic Cable at 64.

52. SNL Kagan, Basic Cable Networks by Subscriber, 2012.

53. *Kagan Basic Cable* at 60.

54. *Id.* at 64. [REDACTED]

When Cablevision spun off AMC Networks in July 2011, the new company closed Wedding Central on the same day.⁵⁵

As demonstrated below, viewers, advertisers, and rightsholders perceive these networks as being similarly situated.

A. Perceptions of Viewers

31. My analysis of GSN and WE tv indicates that the networks are similarly situated from the perspective of viewers.⁵⁶

1. The High Degree of Audience Overlap Implies That GSN and WE tv Are Perceived by Viewers as Being Close in Product Space

32. A significant share of GSN's weekday-evening programming is comprised of relationship-based programming. Indeed, [REDACTED]

[REDACTED]⁵⁷ Within this [REDACTED] GSN has offered *Baggage*, *The Newlywed Game*, and *Love Triangle* over the past two years. During the week of November 8, 2010, the share of GSN's weekday [REDACTED] programming between 6 pm and 10 pm was 50 percent (equal to two hours of *Baggage* and *The Newlywed Game* divided four hours).⁵⁸

33. Of course, GSN's featuring relationship-based programming was not limited to the week of November 8, 2010. Table 2 shows the share of GSN's [REDACTED] programming from October 2010, two months before Cablevision's tiering announcement, through September 2011 for two different viewing windows: (1) 6 pm until 10 pm (the window

55. See "AMC Networks Divorces Wedding Central," Multichannel News (July 8, 2011), <http://www.multichannel.com/content/amc-networks-divorces-wedding-central>.

56. Mr. Orszag's "direct test" does not prove otherwise. His test is a complex, econometric model that must be fit to potentially erroneous tuning data, and followed up with subtle inferences based on parameters estimated with error. This is the opposite of direct evidence. Although he acknowledges that "Viewer audience overlap between networks can provide additional insight into the state of competition between networks," he relegates that direct evidence to a later section of his report. *Orszag Report* ¶17.

57. See *supra* n. 13.

58. At the same time, WE tv offered several relationship-based shows as well, including *My Fair Wedding*, *Bridezillas*, and *Big Easy Brides*.

in which [REDACTED] programming primarily occurred) and (2) 8 pm until 11 pm (the primetime window). Table 2 includes the shares within these windows for weekday only and for weekday and weekend programming.

TABLE 2: SHARE OF [REDACTED] PROGRAMMING ON GSN
OCTOBER 2010 – SEPTEMBER 2011

Time	Oct 10	Nov 10	Dec 10	Jan 11	Feb 11	Mar 11	Apr 11	May 11	Jun 11	Jul 11	Aug 11	Sep 11
<i>Excluding weekends</i>												
6 to 10 PM												
8 to 11 PM												
<i>Including weekends</i>												
6 to 10 PM												
8 to 11 PM												
Source:	[REDACTED]											

Table 2 makes clear that relationship-based, [REDACTED] content accounted for a significant share of GSN's weekday-evening programming for a large window around the tiering event. Similar to GSN, WE tv offers a significant amount of relationship-based programming.

For example, two of WE tv's shows in 2012 (*Braxton Family Values* and *Joan & Melissa: Joan Knows Best*) use "relationships" to describe their programming, and two others (*Marry Me in NYC* and *My Fair Wedding with David Tutera*) use "wedding" to describe their programming.⁵⁹

34. Importantly, the overlap in programming between the two networks is not limited to relationship-based programming focused on romantic relationships. GSN and WE tv both offer a broader range of female-oriented reality programming. For example, the GSN reality show *Carnie Wilson: Unstapled* followed the singer Carnie Wilson as she built a dessert business.⁶⁰ WE tv's *The Cupcake Girls* follows a group of women entrepreneurs who start a

59. Cable Television Advertising Bureau, "WE tv profile," <http://www.thecab.tv/php/networkprofiles/12profileData/2012pdf/12WEtv.pdf>. Prior wedding-themed shows on WE tv include *My Fair Wedding*, *Amazing Wedding Cakes*, *Bridezillas*, *Rich Bride, Poor Bride*, *I Do Over*, and *Big Easy Brides*.

60. GSN Exh. 40.

cupcake company.⁶¹ Further, as demonstrated below, even GSN's anchor, [REDACTED] [REDACTED] programs (*Deal or No Deal*, *Match Game*, and *Family Feud*) exhibit a strong overlap with WE tv's audience, suggesting that GSN's programming appeals to a similar audience.

35. To evaluate whether viewers perceive GSN and WE tv as competitive alternatives, I studied the audience overlap for GSN and other networks, as well as the overlap between specific GSN shows and other networks. In general, economists perceive that Product *A* is an "economic substitute" to *B* if the demand for *A* increases when the price of *B* goes up. Because viewers do not incur prices at the margin for watching different networks (assuming the networks appear on the same tier), a reasonable approximation to economic substitutes that applies here is an analysis of what other networks GSN viewers watch.

36. One source of data that addresses this question is Nielsen NPOWER/MarketBreaks audience duplication reports, which measures networks' shared viewership. These reports provide three duplication statistics: (1) "primary duplication," which (when measured from GSN's perspective) is the likelihood that a viewer watches both GSN and the reference network *conditional on watching GSN*; (2) "secondary duplication," which (when measured from GSN's perspective) is the likelihood that a viewer watches both GSN and the reference network *conditional on watching the reference network*; and (3) "both duplication," which (when measured from GSN's perspective) is the likelihood that a viewer watches both GSN and the reference network *conditional on watching either GSN or the other network*.⁶² By shrinking the size of the denominator in the ratio—the numerator is the same in all three statistics—the primary duplication metric tends to overstate the overlap with popular networks (a

61. GSN Exh. 181.

62. [REDACTED]

large-network bias); similarly, by shrinking the size of the denominator, the secondary duplication metric tends to overstate the overlap with unpopular networks (a small-network bias).⁶³ In contrast, the “both duplication” metric is not sensitive to these biases, as the denominator—which combines the reach of two networks—is less prone to wild swings in a single network’s reach by construction. Table 3 shows an example of the differences in rankings in terms of both and secondary duplication percentages, highlighting the small-network bias of the secondary duplication measure.

TABLE 3: TOP 20 NETWORKS IN TERMS OF BOTH AND SECONDARY DUPLICATION PERCENTAGES, PRIME-TIME, PERSON 18-99, PRIMARY NETWORK [GSN], (4Q 2010)

Network	Both Duplication [Secondary Duplication]	Network	Secondary Duplication [Both Duplication]
LMN			
WE			
HALL			
TVL			
OXYG			
DHLT			
LIF			
TRU			
NFLN			
Investigation Discovery			
STYL			
AEN			
CMT			
FAM			
TLC			
NGC			
ESPN2			
MTV2			
FOOD			
BIO			

Source: [REDACTED]

[REDACTED]

[REDACTED]

63. Because WE tv is less popular than many networks in my sample, it is not surprising that the primary duplication figure between Baggage and WE tv [REDACTED]. Indeed, the correlation coefficient between the primary duplication figures and the national Nielsen 24-hour ratings is [REDACTED], indicating a [REDACTED].

64. [REDACTED].

[illegible]

37. For the purpose of this report, I rely on Nielsen's six-minute criterion, measuring viewers who watched at least six minutes of a program. The advertising industry considers Nielsen to be the gold standard, and six minutes is the standard Nielsen qualifier for viewing programming longer than ten minutes in duration.⁶⁶ From an economic perspective, viewing six or more minutes of a show (particularly one that lasts 30 minutes) conveys a significant amount of information about a viewer's preferences; six minutes or more is at least 20 percent of a 30 minute program, and it is longer than one would expect to see with mere casual channel surfing. According to this statistic, WE tv was the [REDACTED] closest network to GSN among 85

65. *Id.*

66. _____

networks during prime-time hours in the fourth quarter of 2010. Additionally, WE tv was the [REDACTED] network to GSN among 85 networks for total-day viewership in the fourth quarter of 2010. Table 4 summarizes the findings.

TABLE 4: BOTH DUPLICATION PERCENTAGES (4Q 2010)

Time	Demographic	Primary Network	Secondary Network	Both Duplication%	Rank
Total-day	Persons 18-99	GSN	WE tv	[REDACTED]	[REDACTED]
Prime-time	Persons 18-99	GSN	WE tv	[REDACTED]	[REDACTED]

Source: [REDACTED]

Notes: *

**

Although WE tv [REDACTED] with certain other networks, such as Lifetime [REDACTED] and Oxygen [REDACTED], than it does with GSN, the [REDACTED] “both duplication” measure between GSN and WE tv is [REDACTED] between GSN and any other network. It bears noting that [REDACTED] [REDACTED] [REDACTED]⁶⁹ have at various times appeared in WE tv’s competitive analysis, despite their more modest audience overlaps with WE tv (between [REDACTED] [REDACTED]). This confirms that there is no need for GSN to be the closest network to WE tv for Cablevision to benefit from discriminating against it.

38. Analyzing substitution from GSN’s perspective—as opposed to measuring it from WE tv’s perspective—is the more relevant orientation to consider in light of the allegations in this case. Given that Cablevision already carries WE tv on its most penetrated tier, the most viable means by which Cablevision may further advantage WE tv is by degrading their viewers’

67. GSN Exh. 13, at CV-GSN 0248589; GSN Exh. 12 at CV-GSN 008361 [REDACTED]

68. *Id.* See also [REDACTED], CV GSN 0046119 [REDACTED].

69. *Id.* See also GSN Exh. 19 at CV-GSN 0040911 [REDACTED].

access to a similarly situated network such as GSN. By orienting the duplication analysis from the perspective of GSN, one can analyze where GSN's customers would likely turn if their access to GSN were diminished. Although it may be an interesting academic inquiry, considering where WE tv's customers might turn in the event they lost access to WE tv is not as helpful for the purposes of this proceeding, since it was GSN, not WE, that Cablevision decided to place on its narrow Sports & Entertainment tier. [REDACTED]

70

39. I also looked at duplication data from the fourth quarter of 2010 reflecting patterns for viewers at the program level—that is, I looked at duplication data for two relationship-based GSN programs (*Baggage* and *The Newlywed Game*), along with four non-relationship-based GSN programs (*Deal or No Deal*, *Family Feud*, *Match Game* and *Catch 21*). The purpose of this analysis was to determine which programs (or types of programs) were contributing to the high degree of overlap detected at the network level. [REDACTED]

70. Mr. Orszag claims that the audience overlap data are not informative because “that viewers watch both networks A and B does not mean that viewers are choosing between watching the networks or even consider watching network A as a substitute for watching network B, and vice versa.” *Orszag Report* ¶50. The only way that a viewer watches both GSN and WE tv, however, is by substituting time from one activity to the other. Even in the era of DVRs, there is a limited amount of television watching available to a viewer in a given day. The opportunity cost of watching GSN is not getting to watch close substitutes. By studying viewing patterns, we can infer what those close substitutes are. When Mr. Orszag examines the duplication data, he looks at the data from the vantage of WE tv. *Id.* ¶68. Even GSN's ranking in the secondary duplication from WE tv's perspective [REDACTED] is impressive. Mr. Orszag [REDACTED] *Id.* In his mind, [REDACTED] is not highly ranked. *Id.* ¶69. Had Mr. Orszag used prime-time ratings rather than all-day ratings for this exercise, [REDACTED] In prime-time, WE tv ranks [REDACTED] after LMN in terms of “both duplication,” [REDACTED] in terms of secondary duplication, and [REDACTED] in terms of primary duplication.

TABLE 5: BOTH DUPLICATION PERCENTAGES FOR GSN BY PROGRAM (4Q2010)

Program	Relationship-Based	Both Duplication with WE tv	Rank*
Baggage	Y		
The Newlywed Game	Y		
Deal or No Deal	N		
Family Feud	N		
Catch 21	N		
Match Game	N		

Note: I have excluded two non-national-cable networks (“Regional Sports Networks” and “All Other Ad Supported Cable Orig”) from the analysis. Qualified audience of six minutes.

Source:

As is evidenced by Table 5, even GSN’s anchor, programs (*Deal or No Deal*, *Match Game* and *Family Feud*). This finding is consistent with Mr. Brooks’ testimony that all game shows, even those that are not focused on romantic relationships, are targeted to and appeal to women.⁷²

2. Mr. Orszag’s “Direct Test” Fails to Inform the Relevant Inquiry

40. To support his claim that viewers do not perceive GSN and WE tv to be substitutes, Mr. Orszag presents a regression analysis, which he styles as “a direct test of competition for viewership”⁷³ between GSN and WE tv. Mr. Orszag claims that the effect of retiering—. As I explain below, Mr. Orszag’s econometric analysis is flawed, and his conclusions are not

71. See also GSN Exh. 48; GSN Exh. 220, Hopkins Testimony, ¶11.

72. GSN Exh. 222, Written Direct Testimony of Timothy Brooks, ¶7 [hereinafter Brooks Testimony]; *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of Timothy Brooks, October 10, 2011, §§ III.1.c - e.

73. *Orszag Report*, ¶27.

supported by the data. Mr. Orszag's "direct test" divides households into a "control group,"⁷⁴ which did not lose access to GSN after the retiering, and a "treatment group," which did. The results of Mr. Orszag's "direct test" hinge on the extent to which households in the treatment group viewed higher levels of WE tv after the retiering than did households in the control group. Mr. Orszag's "direct test" is fundamentally contaminated, because households in his control group are disproportionately likely to be avid viewers of GSN ("GSN Loyalists"), while those in his treatment group are disproportionately likely to be non-GSN Loyalists. In other words, the "treatment" is applied to precisely those households that are least likely to respond to it. Even setting aside this fundamental problem of contamination, Mr. Orszag's analysis suffers from additional econometric shortcomings; when they are corrected, the analysis shows that WE tv enjoyed a statistically significant increase in viewing among Cablevision subscribers after the tiering of GSN.

41. If the tiering of GSN were actually a [REDACTED], then a subset of Cablevision households would have to lose access to GSN *at random*, without regard to their preferences for GSN programming. But the selection of Cablevision households that lost access to GSN was anything but random: Households in the control group, by definition, include any households that received the Sports & Entertainment tier ("S&E tier") on a [REDACTED], as well as any households that purchased the S&E tier ([REDACTED]) in order to continue viewing GSN. In other words, Mr. Orszag's control group is a self-selected group of households that are disproportionately likely to be GSN Loyalists. Conversely, non-GSN Loyalists are disproportionately likely to be placed in Mr. Orszag's treatment group.

74. *Orszag Report*, Appendix B, ¶2.

42. To illustrate, note that the households in Mr. Orszag's control group viewed, on average, approximately [REDACTED] of GSN in April 2010 (or approximately [REDACTED] per week). In contrast, the households excluded from Mr. Orszag's "control group" viewed, on average, only about [REDACTED] of GSN in April 2010 (or approximately [REDACTED]). Thus, households in the "control group" viewed, on average, more than [REDACTED] as much GSN as those in the "treatment group." This indicates that the control group is not randomly selected, and instead suffers from self-selection. Although Mr. Orszag's regression analysis controls for households' GSN viewership shares in 2010, it cannot control for the unobserved preferences that would induce one household to self-select into Mr. Orszag's control group, and another household (possibly with the same 2010 GSN viewership share as the first household) to remain in Mr. Orszag's treatment group.

43. In summary, Mr. Orszag's "direct test" attempts to measure the extent to which viewers perceive We tv and GSN as substitutes by searching for a "lift" in We tv viewership among non-GSN-loyal households after the retiering. Attempting to measure competition between GSN and We tv in this manner is a fools' errand—the very people who are most inclined to shift GSN viewing hours (because they are plentiful) into WE tv hours have been removed from the treatment group.

44. In Appendix 2, I describe the technical details of Mr. Orszag's model in greater detail, and correct for additional econometric errors. After correcting for technical mistakes in his model, I demonstrate that *the more a household's viewership share of GSN declined from 2010 to 2011, the more its viewership share of WE tv tended to increase, suggesting that (non-GSN-loyal) households do, in fact, tend to replace GSN viewership with WE tv viewership*. It bears noting, however, that even these "corrected" specifications are incapable of identifying the

relevant substitution patterns, given that we do not observe how households in the “control” group (with strong preferences for GSN) would have responded when deprived of GSN access.

B. Perceptions of Advertisers

45. In addition to competing for viewers, rival cable networks compete for advertising dollars. In this section, I present evidence suggesting that advertisers perceive GSN and WE tv to be similarly situated.

1. A Distance Analysis and Advertising Overlap Analysis Indicates That Advertisers Perceive GSN and WE tv to Be Similarly Situated

46. Advertisers consider demographic information in their purchasing decisions, and therefore women-oriented networks such as GSN and WE tv likely compete for advertisers. The target audience of GSN is very similar to that of WE tv. For example, [REDACTED] of GSN’s viewers are female.⁷⁵ Both networks are [REDACTED] in terms of the degree of such networks’ female skew.

47. To be fair, two networks might appear “close” across one dimension but “distant” across another. [REDACTED]

[REDACTED], I use a multivariate measure of distance to compare the demographic characteristics of the networks along multiple dimensions. When the subjects of a product comparison vary across multiple dimensions (for example, age, gender, race, education, occupation, and household size), a distance analysis allows one to consolidate the myriad distances into a summary statistic. Analyzing the demographics of viewers themselves, I can determine, through an index of similarity, the extent to which particular groups of viewers are similar. A measure of similarity can be determined for each network pair.

75. See [REDACTED]. See also GSN Exh. [REDACTED].

48. One commonly accepted method of determining similarity or “distance” between groups of data is called Mahalanobis distance, which was named after Prasanta Mahalanobis, the statistician who invented the measure.⁷⁶ The measure can be calculated through the use of one or multiple variables. A single number ultimately is generated, and this number represents the distance between the data; the larger number, the greater the distance.

49. I obtained the data necessary to implement the distance calculation for WE tv and GSN based on [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]


50. Access to demographic data by network in multiple quarters permits the analyst to calculate how the variables relate to each other over time; for example, as GSN’s average household size changes, one can measure whether the average household size of another network is changing in the same or opposite direction (along with the movements in other demographic variables). In particular, my analysis compares the distance along demographic dimensions for two networks based on the arithmetic mean of each demographic variable and the “covariance matrix” of the two networks. The covariance matrix associated with a particular network pair is then used as the weight when computing the distance between the two networks.

76. P.C. Mahalanobis, “On the Generalized Distance in Statistics,” 2 *Proceedings of the National Institute of Sciences of India* 49-55 (1936).

51. To illustrate, suppose that only a single demographic variable is observed (say, household income). Suppose further that the average household income for GSN viewers is \$40,000, and that the average for WE tv viewers is \$50,000. The relevant question is whether this \$10,000 difference should be considered “large” or “small,” when compared to income differences across other networks. If household income is highly variable for GSN and WE tv viewers, then a \$10,000 differential would not necessarily be considered “large.” Similarly, assume that the average household income for CNN viewers is \$50,000, again implying a \$10,000 difference relative to GSN viewers. If household income for CNN and GSN viewers is more (less) variable than it is for GSN viewers and WE tv viewers, then the \$10,000 GSN/CNN differential would receive less (more) weight than the \$10,000 GSN/WE tv differential. Accordingly, the analysis is informed by differences in variability in demographic characteristics across different network pairings.⁷⁷

52. I simulated the distance between GSN and WE tv for 360 possible specifications.⁷⁸ For example, in some specifications, I used percent of households with one or

77. In contrast, Mr. Orszag's



78. There are a total of 360 combinations that I can compute for the distance calculation (equal to the product of four household size/age variables, five education variables, six employment variables, three race variables, one

two members and the head of household under 50 for the measure of household age, whereas in others I used households with three or more members and the head of household over 50. On average across the 360 specifications, WE tv ranked [REDACTED] closest network to GSN among 101 networks [REDACTED].⁷⁹ Based on these results, I conclude that WE tv is [REDACTED] to GSN in terms of demographic characteristics than are other networks in my sample. The point of the distance analysis is not to test whether WE tv is the *closest* network among all possible networks in the sample. Rather, the point is to test whether WE tv is *sufficiently close* to GSN to be considered similarly situated for a discrimination analysis.

53. That both GSN and WE tv tend to [REDACTED] [REDACTED] likely explains why they appear to target the same advertisers.⁸⁰ Indeed, as Table 6 below demonstrates, [REDACTED] [REDACTED].

share without children variable, and one share female variable). Each variation would include one of the four household size/age variables, one of the five education variables, one of the six employment variables, one of the three race variables, the share of households without children, and the share of the head of household being a female

79. Across the 360 specifications, the average distance between GSN and WE tv is [REDACTED].

80. GSN Exh. 219, Written Direct Testimony of Kelly Goode, ¶¶10-11 [hereinafter Goode Testimony]; *Game Show Network, LLC v. Cablevision Systems Corp.*, Declaration of David Goldhill, October 7, 2011, ¶10 [hereinafter *Goldhill Declaration*] (explaining that GSN and WE tv target the same demographic and advertisers).

TABLE 6: OVERLAP BETWEEN WE tv's AND GSN's ADVERTISING, JULY 2010-JULY 2011

Rank	Advertiser (Parent Company)	WE tv	GSN Accounts
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			
13			
14			
15			
16			
17			
18			
19			
20			
21			
22			
23			
24			
25			
26			
27			
28			
29			
30			
31			
32			
33			
34			
35			
36			
37			
38			
39			
40			
Top 40 Accounts, Overlap			
Source:			

As Table 6 shows, between July 2010 and July 2011 [REDACTED] of WE tv's top 40 advertising accounts (weighted by expenditures on WE tv commercials) also advertise on GSN. Moreover, [REDACTED] of *all* of WE tv's advertising accounts (weighted by expenditures on WE tv commercials) also advertise on GSN. Similar results reveal that [REDACTED] of GSN's top 40 advertising accounts (weighted by expenditures on GSN commercials) also advertise on

WE tv, and [REDACTED] of *all* of GSN's advertising accounts (weighted by expenditures on GSN commercials) also advertise on WE tv.⁸¹ A high degree of advertising overlap among two networks indicates that advertisers perceive the two networks as serving up a similar audience demographic.⁸²

54. Using a more granular database that includes the advertising parents as well as the brands, I can give context to the meaning of the [REDACTED] advertising-overlap figure from Table 6. Between January and December 2010, the brand-level data when combined for parent companies⁸³ shows that [REDACTED] percent of WE tv's top 40 advertising accounts also advertised on GSN. I compute the comparable overlap for WE tv's top 40 advertisers with 87 other cable networks (excluding GSN). The WE tv-GSN advertiser overlap of [REDACTED] percent at the parent level ranks [REDACTED] among [REDACTED] possible overlaps with WE tv's top 40 advertisers.⁸⁴

55. Cablevision may claim that these results are skewed by the fact that a large conglomerate like [REDACTED] would advertise one product on GSN and another product on WE tv. To test this conglomerate hypothesis, I performed the analysis at the brand level as opposed to the firm level. I used [REDACTED] [REDACTED].⁸⁵ Whereas I originally found that advertising *customers* that

81. Although the weighting does not change the result—[REDACTED]—giving advertisers who advertise more heavily with WE tv more weight makes sense for the purposes of an overlap analysis; tapping one's largest client is more significant than tapping one's smallest client.

82. Mr. Orszag downplays the importance of this advertising overlap, arguing that "the fact that networks have common advertisers is not indicative of whether advertisers are choosing between the networks for their advertising messages." *Orszag Report* ¶98. This is similar to his critique regarding a viewer's watching two programs. Again, an advertiser has a fixed budget; the opportunity cost of buying ads on network A is spending less on network B.

83. [REDACTED]

84. Additionally, from the perspective of GSN's top 40 advertisers, GSN-WE tv advertiser overlap is [REDACTED] percent, which ranks [REDACTED] among [REDACTED] possible overlaps.

85. [REDACTED]

advertise on GSN account for [REDACTED] percent of WE tv's revenue from its [REDACTED] advertising customers, my revised analysis shows that there is also significant overlap among the *advertising brands* that advertise on GSN and WE tv. Brands that advertise on GSN account for [REDACTED] percent of WE tv's revenue from its top 40 advertising customers. [REDACTED]

[REDACTED] The decline from [REDACTED] to [REDACTED] percent is expected given the increased granularity of brands compared to firms.⁸⁶ Moreover, I repeated this advertising overlap analysis for WE tv's top 40 brands with 87 other cable networks (excluding GSN). It turns out that the WE tv-GSN brand overlap of [REDACTED] percent ranks [REDACTED] among [REDACTED] possible overlaps with WE tv's top 40 brand advertisers.⁸⁷

56. Finally, I calculated advertising budget shares for each brand [REDACTED]. The following [REDACTED] brands dedicated more than 10 percent of their respective total advertising budgets on *both* WE tv and GSN in 2010: [REDACTED]

[REDACTED]. For example, [REDACTED] allocated [REDACTED] percent of its television advertising budget to GSN and [REDACTED] percent to WE tv. Such high combined budget shares suggest that certain advertisers believe that GSN and WE tv deliver a similar audience.

86. Mr. Orszag insists that the observed overlap at the brand level is significant only if the brand is in the top 40 brands of *both* GSN and WE tv. This more onerous requirement is not justified. Under this standard, Mr. Orszag would discount the overlap if the brand ranked 39th on GSN's list but ranked 41st on WE tv's list.

87. I also performed this analysis for GSN's top 40 brands compared with 87 other cable networks (excluding WE tv). GSN-WE tv brand overlap from the perspective of GSN top 40 brands is [REDACTED] percent, which ranks [REDACTED] among [REDACTED] possible overlaps.

2. Mr. Orszag Seeks To Impose Standards Irrelevant to An Economic Determination of Whether Networks Are Similarly Situated

57. To be similarly situated, two networks need not be economic substitutes. Yet Mr. Orszag would require evidence that GSN disciplines WE tv's advertising rates to find that they are similarly situated. When evaluating whether two networks are similarly situated, Mr. Orszag uses the term "close alternatives" and "economic substitutes" interchangeably—the latter are defined as goods that exhibit (positive) cross-price elasticities.⁸⁸

58. Mr. Orszag goes one step further by requiring that the affiliated network (as opposed to the vertically integrated cable operator) enjoy pricing power vis-à-vis advertisers or distributors. Under this heightened standard, the non-discrimination obligation of the Cable Act would apply only to cable operators that have the ability to dictate carriage fees or advertising rates for their affiliated programming; if a vertically integrated cable operator's affiliated network lacks pricing power then, by Mr. Orszag's logic, it cannot be found to discriminate.⁸⁹ According to Mr. Orszag, "to the extent there is any pricing constraint imposed by GSN, the degree of that pricing constraint would be negligible relative to the pricing constraint provided by other networks."⁹⁰ Thus, his test for similarly situated networks is rigged to fail from the start because WE tv is assumed not to have market power. To the extent that a finding of market power has *any* place in a program-carriage proceeding, it is the market power of the regulated firm—namely, the cable operator—that matters. And Cablevision enjoys [REDACTED] of

88. *Orszag Report* ¶65.

89. *Orszag Report* ¶13 ("Under standard economic theory, Cablevision could only plausibly have an incentive to discriminate against GSN in favor of its affiliated networks, WE tv and Wedding Central, if the prices charged by the affiliated networks were effectively constrained by GSN.").

90. *Id.* ¶112.

MVPD subscribers in the New York DMA,⁹¹ a large share in a geographic market that is critically important for rival networks.

59. Setting aside the irrelevance of price effects to a determination of whether networks are similarly situated, Mr. Orszag's analysis is simply wrong: A vertically integrated operator's affiliated network can benefit in many ways without pricing power. For example, an increase in subscribers caused by tiering, albeit at a constant license fee, would benefit WE tv; an increase in advertising revenues at a constant advertising rate or the enhanced ability to compete for relationship-based content would also benefit WE tv; and an increase in viewership (with no concomitant price effects) would benefit WE tv to the extent it permitted the network to sell a larger share of its advertising inventory. Thus, the notion that WE tv cannot be found to discriminate because it lacks pricing power is extreme, turns the non-discrimination protections on their head, ignores non-price ways in which WE tv can benefit (although Section 616 does not require any such benefit), and would immunize vertically integrated cable operators from discrimination claims unless they possessed pricing power in some relevant market.

60. Mr. Orszag's search for price effects permeates his advertiser-competition analysis.⁹² He claims that "significant competition" between WE tv and GSN for advertisers would "be reflected in WE tv's advertising rates, which would be significantly constrained by GSN's advertising rates, and vice versa."⁹³ He asserts that I failed to show evidence that GSN's advertising rates have been lowered by the tiering.⁹⁴ If the demand for GSN's general-rate advertising declined unexpectedly by [REDACTED] after the tiering (see Part IV.B below), it is

91. *See* CV-GSN 0427070.

92. Mr. Orszag also insists on evidence of price effects to prove that GSN and WE tv compete for programming. *Orszag Report* ¶109.

93. *Id.* ¶108.

94. *Id.* ¶154.

reasonable to conclude that GSN's ability to constrain WE tv's advertising rates was also diminished.

61. Mr. Orszag argues [REDACTED] [REDACTED] between GSN and WE tv implies that the two networks are not similarly situated from the vantage of advertisers.⁹⁵ Again, the search for economic substitutes causes Mr. Orszag to fixate on price-disciplining effects, which may not exist for myriad reasons. For example, a nascent network may not impose incremental price discipline on a well-established network; and an established network that competes vigorously with several networks in its genre might lack pricing power, which means that any other individual network does not impose price-discipline at the margin.⁹⁶

62. Finally, Mr. Orszag argues that GSN's and WE tv's [REDACTED] shares implies no price-disciplining effect,⁹⁷ which in his mind means that the networks are not similarly situated. Setting aside the irrelevance of a price-disciplining effect, that two products constitute a [REDACTED] does not imply lack of substitution. Consider beef and chicken in a household's food budget. As chicken prices rise, the household might switch to beef at the margin, [REDACTED] are accounted for by chicken and beef.

C. Perceptions of Rightsholders

63. GSN also competes directly against WE tv for the same programming rights. Like advertising dollars, competition along this dimension could give rise to an incentive to

95. *Id.* ¶91.

96. In any event, the disparity in the price of two goods does not imply that the cheaper good imposes zero price discipline on the more expensive good: A Hyundai Elantra (MSRP of \$16,000 to \$24,000) might discipline the price of a Honda Civic (MSRP of \$18,000 to \$26,000), despite the fact that the Elantra is less expensive.

97. *Orszag Report* ¶95.

discriminate. If rightsholders perceive GSN and WE tv to be comparable outlets for their programs, then Cablevision has an incentive to discriminate against GSN.

64. Certain shows were pitched to both GSN and WE tv. For example, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁹⁹ Moreover, the following six shows were pitched to both GSN and WE tv: [REDACTED] [REDACTED] [REDACTED] [REDACTED]

[REDACTED] [REDACTED] [REDACTED]¹⁰⁵ That several rightsholders perceive GSN and WE tv to be reasonably interchangeable outlets bolsters my prior conclusion that the networks are similarly situated.¹⁰⁶

III. CABLEVISION'S DISCRIMINATION LACKS ANY EFFICIENCY JUSTIFICATION

65. In this section, I consider alternative, efficiency explanations for Cablevision's carriage policy. Although disparate treatment of similarly situated networks strongly suggests discrimination, it is possible that some alternative, efficiency explanation could explain Cablevision's conduct vis-à-vis GSN. I am not aware of any evidence that Cablevision applied

98. [REDACTED]

99. *Id.*

100. *See* GSN Exh. 159.

101. *See* GSN Exh. 160.

102. *See* GSN Exh. 162.

103. *See* GSN Exh. 160.

104. *See* GSN Exh. 160.

105. *See* GSN Exh. 161.

106. According to Mr. Orszag, that certain rightsholders approached both GSN and WE tv does not constitute evidence of "competition." *Orszag Report* ¶109. He would require the additional step that GSN or WE tv offered the rightsholders contracts or developed the concepts into shows. This requirement is not grounded in economics, and Mr. Orszag fails to provide any basis for this position.

such a cost-benefit test to WE tv or to any of its affiliated networks,¹⁰⁷ and the selective application of a test is in and of itself discriminatory.¹⁰⁸

66. Nor I am persuaded by any *ex post* “business judgment” rationales offered by Cablevision’s economic expert. For example, Mr. Orszag claims that “contractual flexibility” makes Cablevision’s tiering GSN sound.¹⁰⁹ As Judge Sippel explained in the *Tennis Channel* ruling, that a vertically integrated cable operator had the contractual right to tier a rival network under the contract does not immunize that operator from discrimination claims under the Cable Act. [REDACTED]

[REDACTED]¹¹⁰

67. Mr. Orszag also claims that Cablevision executives considered and dismissed the likely reaction of subscribers to the tiering of GSN.¹¹¹ But he cites no evidence that Cablevision executives imposed the same “likely outcry” test on WE tv. Cablevision’s set-top data show that [REDACTED]

[REDACTED]. Thus, it is not clear that the loss of WE tv would have generated a greater outcry than that associated with the loss of

107. As an illustrative example, if an economic consulting firm gave female applicants a difficult econometric test during their interviews, but permitted male applicants to skip the test, then the application process would be discriminatory on the basis of gender—regardless of what fraction of the females passed the test. Mr. Orszag cites a Cablevision document noting cost savings associated with tiering GSN. *Orszag Report* ¶115. But Cablevision would also enjoy cost savings from tiering any network, including its own. Accordingly, this is not evidence of a cost-benefit test.

108. Judge Sippel recognized this selective application of the cost-benefit test in the *Tennis Channel* case. *See Tennis Channel Initial Decision*, ¶74 (“When Comcast Cable renewed its affiliation agreements with Versus and Golf Channel in 2009 and 2010, respectively, however, it did *not* undertake a cost-benefit analysis as to whether it should reposition those affiliated networks to a different tier.”). *Tennis Channel, Inc. v. Comcast Cable Communications, L.L.C., Memorandum Opinion & Order*, Docket No. 10-204, File No. CSR-8258-P, FCC 12-78 (Jul. 24, 2012), ¶¶76-80 [hereinafter *Tennis Channel Order*].

109. *Orszag Report* ¶116.

110. *See* GSN Exhs. 202 and 203.

111. *Orszag Report* ¶116.

GSN—([REDACTED]). Mr. Orszag’s post-retiering profitability analysis— notwithstanding its serious shortcomings as described below—cannot validate Cablevision’s decisions, as these precise outcomes could not have been known *ex ante* to Cablevision. Moreover, he fails to consider how his *ex post* profitability evaluation would apply to WE tv.

A. Comparisons of Price or Ratings-Adjusted Price

68. Compared with Cablevision-owned networks, GSN provides a better value per ratings point, costing (according to SNL Kagan) on average [REDACTED] per subscriber per month in 2009 and generating an average 24-hour ratings of [REDACTED].¹¹² By comparison, SNL Kagan reports that WE tv charged an average [REDACTED] per subscriber per month in 2009 and generated an average 24-hour ratings of [REDACTED].¹¹³ Table 7 shows the second quarter 2010 average price per subscriber per month and average 24-hour household ratings point for GSN, WE tv, and the other Cablevision-owned networks. Nationally, GSN has a [REDACTED] price per rating point than the [REDACTED] average price per rating point for Cablevision-owned networks carried on Cablevision’s Family Cable tier (for which rating point data are available). Similarly in the New York DMA, GSN has a [REDACTED] price per rating point than the [REDACTED] average price per rating point for Cablevision-owned networks.

112. *Kagan Basic Cable* at 322. [REDACTED]

113. *Kagan Basic Cable* at 613.

TABLE 7: AVERAGE PRICE PER SUBSCRIBER PER MONTH AND PER RATING POINT,
BY NATIONAL CABLE NETWORK (2Q 2010)

Network	Owned by Cablevision in 2010	Average Price Per Sub Per Month	HH Ratings: National	Price Per Ratings Point	HH Ratings: NY DMA [^]	Price Per Ratings Point
		1	2A	3 = 1 / 2A	2B	3 = 1 / 2B
GSN	No					
WE tv	Yes*					
AMC	Yes*					
Fuse	Yes**					
IFC	Yes*					
Sundance	Yes*					
Wedding Central	Yes***					
Average Cablevision-Owned						
Source:						

Notes: * Spun off in 2011. ** Spun off in 2010. *** Closed in Jul. 2011. ^ NY DMA ratings data were for 9 am to 4 am.

As Table 7 shows, WE tv is [REDACTED] as GSN on a per-rating-point basis, both nationally and within the New York DMA.¹¹⁴ GSN's national total-day ratings [REDACTED] the total-day ratings of WE tv ([REDACTED]).¹¹⁵ Thus, it would be unreasonable for Cablevision [REDACTED]. Indeed, other Cablevision-affiliated content such as Fuse is even more expensive on ratings-point basis ([REDACTED]). And Wedding Central's certainly infinitesimal ratings in the New York DMA¹¹⁶ imply an even higher price on per-ratings-point basis.

69. Price-per-ratings point is commonly used measure of value in the cable video industry. [REDACTED]

114. [REDACTED]

115. *Kagan Basic Cable* at 322, 613.

116. Nielsen ratings are not available for Wedding Central.

[REDACTED]

[REDACTED]¹¹⁷ Stated differently, cable operators look at a network's ratings when making carriage and valuation decisions; holding a network's license fee constant, a higher rating generates more value for the cable operator in terms of attracting more subscribers and partaking in greater advertising revenues. Indeed, [REDACTED]

[REDACTED]¹¹⁹ Accordingly, expressing value to cable operators on a per-rating-point basis is a standard metric in the cable industry.¹²⁰ More importantly, even if Cablevision does not calculate a network's price per Nielsen ratings point when making carriage decisions, the metric is valuable because it reflects the value of a network relative to its popularity.¹²¹ Any alternative measure of value, including those derived from Cablevision's set-top box data, must be assessed based on an objective understanding of the networks' relative value.

To gauge the sensitivity of my price-per-ratings point metric to the choice of national versus local ratings data, I have supplemented my analysis based on [REDACTED]. I

117. *Kagan Basic Cable* at 51.

118. *Id.* at 13.

119. *Id.*

120. Price per rating point has been used by academics to study the advertising industry. *See, e.g.,* W. Wayne Fu, Hairong Li, & Steven S. Wildman, "Explaining Prices Paid for Television Ad Time: The Purchasing Profile Model," *The Media Industries and their Market: Quantitative Analyses 10* (2010) (dividing the "30 second rates . . . by the corresponding season average Nielsen ratings to create *UnitRate*, an estimate of the average *price per rating point* paid by advertisers for each program in the sample.") (emphasis added); Przemyslaw Jeziorski, "Merger enforcement in two-sided markets," Johns Hopkins University, Working Paper, Mar. 24, 2011 ("The initial regression used *price per rating point* and regressed on a market's HHI.") (emphasis added).

121. To an economist, what matters is whether Cablevision's conduct can be modeled *as if* the company considers this metric. In Milton Friedman's classic example, expert billiards players, who have no formal physics training, nevertheless play pool *as if* they had a perfect understanding of kinetics. *See* Milton Friedman, *Essays in Positive Economics* (University of Chicago Press, 1953).

found a price per rating point of [REDACTED] for GSN and [REDACTED] for WE tv using New York DMA rating data. It bears noting that [REDACTED]

[REDACTED],¹²² which suggests that this comparison is conservative. GSN appears [REDACTED] to WE tv even in the New York DMA. But the point of the test is not to determine the extent to which GSN is more valuable than WE tv. Rather, it is to determine whether Cablevision could be justified in treating GSN differently than WE tv. Based on this standard measure of value—regardless of whether one considers national ratings, as I did in my initial declaration, or local ratings—there is no such justification.¹²³

B. Carriage Decisions of Other Programming Distributors

70. Although the best metric for evaluating whether Cablevision's tiering policy was discriminatory is to evaluate its treatment of a network relative to its treatment of similarly situated affiliates, it also is relevant that, relative to its peers, Cablevision carries GSN on significantly less favorable terms. Following the retiering, GSN reaches approximately [REDACTED] of Cablevision's [REDACTED] basic subscribers. According to SNL Kagan, GSN's penetration across all MVPDs was projected to be [REDACTED] by 2011.¹²⁴ As demonstrated in Table 8, Cablevision's peers—defined as all MVPDs with over two million basic

122. [REDACTED]

123. Mr. Orszag [REDACTED]

124. *Kagan Basic Cable* at 34.

subscribers—carry GSN on tiers that reach on average nearly [REDACTED] the proportion of subscribers than does Cablevision ([REDACTED] versus [REDACTED]).

TABLE 8: TIERING DECISIONS OF LARGE MVPDS AS OF JUNE 2011

Distributor	Total Basic Subscribers	GSN Subscribers	GSN Penetration to Basic Subscribers
	1	2	3 = 2 / 1
Comcast	[REDACTED]	[REDACTED]	[REDACTED]
DirecTV	[REDACTED]	[REDACTED]	[REDACTED]
Time Warner / Bright House	[REDACTED]	[REDACTED]	[REDACTED]
Dish [^]	[REDACTED]	[REDACTED]	[REDACTED]
Cox*	[REDACTED]	[REDACTED]	[REDACTED]
Charter	[REDACTED]	[REDACTED]	[REDACTED]
Verizon	[REDACTED]	[REDACTED]	[REDACTED]
Cablevision**	[REDACTED]	[REDACTED]	[REDACTED]
AT&T	[REDACTED]	[REDACTED]	[REDACTED]
Totals (excluding Cablevision)	[REDACTED]	[REDACTED]	[REDACTED]
Sources:	[REDACTED]	[REDACTED]	[REDACTED]

Notes: [^] Estimated based on U.S. subscribership; * Cox [REDACTED]; ** This figure includes carriage on cable systems that Cablevision recently acquired from Bresnan, outside of the New York market.

71. Accordingly, Cablevision cannot plausibly argue that its tiering policy vis-à-vis GSN is supported by the choices of its peers.¹²⁵ For the forgoing reasons, GSN's pricing and ratings do not offer an alternative, efficiency explanation that could explain Cablevision's conduct vis-à-vis GSN. Barring some convincing efficiency explanation that explains not only Cablevision's treatment of GSN but also its more favorable treatment of Cablevision-affiliated

125. Mr. Orszag discounts the GSN penetration data from Cablevision's rivals—data that he cited in his NFL testimony as the “most direct and compelling evidence” of discrimination—and instead focuses on the fact that two operators (Time Warner and Verizon) carry WE tv on their expanded basic service tiers, but carry GSN on a less penetrated tier, despite the fact that both carry GSN more generously than does Cablevision. *Orszag Report* ¶130. That DISH, Cox, AT&T, Time Warner and Verizon offer GSN on a less penetrated tier than the expanded basic service tier is irrelevant—GSN is not demanding carriage on Cablevision's expanded basic service tier *per se*; it is demanding equal carriage, which could be satisfied on any tier. The only explanation Mr. Orszag can fathom for the disparate treated afforded GSN by Cablevision (relative to Cablevision's peers) is Cablevision's allegedly urban base of subscribers. But other cable operators, including Comcast, have significant urban footprints, yet they tend to carry GSN more broadly. He acknowledges that “many MVPDs choose to carry WE tv and GSN in a similar way.” *Id.* ¶141.

networks, I conclude that Cablevision's disparate treatment of a similarly situated network most likely amounts to discrimination on the basis of affiliation.

72. Finally, regional variations in the demand for GSN's programming do not explain the difference between Cablevision's carriage of GSN and that of other MVPDs. According to Mr. Brooks's Nielsen data, both GSN's and WE tv's ratings [REDACTED], respectively, as one toggles from national ratings data to New York DMA data. While the [REDACTED] for GSN [REDACTED] that of WE tv, GSN national Nielsen ratings [REDACTED] WE tv's [REDACTED]. In fact, as demonstrated above, GSN's price per rating point is [REDACTED] to WE tv's price per rating point when evaluated using New York DMA ratings data. And Wedding Central presumably had infinitesimal ratings in the New York DMA¹²⁶ when Cablevision carried it broadly.

C. Mr. Orszag's Profit-Sacrifice Test Is Inconclusive and Suggests That Cablevision May Have Incurred a Short-Term Loss from the Tiering

73. Mr. Orszag claims that "Cablevision's decision to retier GSN was likely profitable for Cablevision's cable division."¹²⁷ However, as I explain below, Mr. Orszag fails to demonstrate that Cablevision's distribution arm materially profited from the tiering of GSN. Indeed, the data suggest that the distribution arm likely did not enjoy any material increase in profits due to the retiering, and may well have suffered losses due to customer churn.

74. The profitability (or lack thereof) of the retiering decision to Cablevision's distribution business depends on several factors. The potential benefits to Cablevision would consist of any incremental profits earned on households electing to purchase the S&E tier in

126. *See supra* n. 67.

127. *Orszag Report* ¶118.

response to GSN's retiering. For each subscriber that joined the S&E tier, Cablevision earned \$6.95 in revenue per month, and paid [REDACTED]¹²⁸ in license fees per month. Although GSN's retiering saved approximately [REDACTED]¹²⁹ per month in license fees, this is largely irrelevant, as it would [REDACTED].¹³⁰

75. The costs of retiering fall into two basic categories. First, approximately [REDACTED] customers called Cablevision to complain in response to GSN's retiering;¹³¹ by April 2011, Cablevision [REDACTED]
[REDACTED].¹³² Because Cablevision [REDACTED]
[REDACTED]
[REDACTED].¹³³ Second, to the extent that some households cancelled their Cablevision subscriptions as a result of the retiering, Cablevision incurred additional losses due to customer churn.¹³⁴ I assume conservatively that Cablevision's

128. See [REDACTED]
[REDACTED].

129. See GSN Exh. 176, [REDACTED]
[REDACTED].

130. Even without moving WE tv, Cablevision could have achieved essentially the same cost savings it achieved by tiering GSN by simply [REDACTED]
[REDACTED]. See Exh. 109 at 43 [REDACTED]. MFN protections are price protective measures often included in distribution agreements. See, e.g., GSN Exh. 67.

131. See GSN Exh. 132.

132. The data indicate that Cablevision provided [REDACTED]
[REDACTED]. See GSN Exh. 182.

133. According to [REDACTED]
[REDACTED]. See GSN Exh. 176
[REDACTED]

134. Subscriber churn has been a matter of concern for Cablevision. See GSN Exh. 168 ("The new focus is on retaining subscribers. 'We want to improve our relationship with our existing customers and ensure that they know that we value them and their business,' said Mr. Dolan, whose family controls the company, speaking to analysts on a conference call in February.").

average revenue per subscriber per month for a GSN customer was [REDACTED],¹³⁵ with a gross profit margin of [REDACTED].¹³⁶ Accordingly, Cablevision would have sacrificed profits of [REDACTED] per subscriber per month due to customer churn in response to GSN's retiering.

76. After correcting for the deficiencies in Mr. Orszag's econometric analysis, the S&E subscription data indicate that roughly [REDACTED] Cablevision customers became first-time S&E tier subscribers in response to the tiering. This suggests that virtually all of the incremental S&E subscribership that Mr. Orszag's methodology would mistakenly attribute to GSN's retiering was, in reality, attributable to Cablevision's [REDACTED]

[REDACTED] However, the data indicate that [REDACTED]

[REDACTED].¹³⁷

77. With respect to churn, the data suggest that roughly [REDACTED] customers left Cablevision due to [REDACTED]. Because the losses per subscriber due to churn are nearly [REDACTED] as large as the gains (equal to [REDACTED] [REDACTED]) associated with incremental ([REDACTED]) S&E subscribership ([REDACTED]), it follows that Cablevision would have had to attract more than [REDACTED]

135. The monthly price of the Family Tier in 2010 was \$55.95. See [REDACTED]

136. [REDACTED] See also GSN Exh. 80.

137. See GSN Exh. 182. [REDACTED]

as many [REDACTED] S&E tier subscribers as it lost from churn in order for the retiering to be profitable. Yet the data suggest that [REDACTED]. Furthermore, the ratio would likely decline over time, given that losses sustained due to churn would presumably continue more or less in perpetuity (that is, the cancelled subscriber would likely never return), whereas the gains associated with incremental S&E subscribership are likely to continue to dissipate over time, as more and more ([REDACTED]) customers drop the S&E tier.

78. In Appendix 3, I explain the basis for my estimates of (1) the number of incremental S&E subscriptions in response to GSN's retiering; and (2) customer churn in response to GSN's retiering.

IV. AS A RESULT OF CABLEVISION'S DISCRIMINATORY CONDUCT, GSN IS SIGNIFICANTLY RESTRAINED IN ITS ABILITY TO COMPETE FOR ADVERTISERS, VIEWERS, PROGRAMMERS, AND MVPDs

79. GSN suffers many types of harm due to Cablevision's discriminatory policy, including forgone license fees, forgone advertising sales, the inability to secure other carriage agreements, and the inability to compete for advertisers and viewers. It is worth noting that my opinion on impairment appears to be consistent with the recent opinion of Chief Administrative Law Judge Sippel:

Networks placed on the Sports Tier, are disadvantaged *vis-à-vis* the affiliation [sic] networks distributed on widely penetrated tiers. That is because license fees are calculated on a per subscriber basis and as a result, those networks receive less in license fees than if carried on broadly distributed tiers. Limited distribution also makes it more difficult for those networks to attract advertisers and compete for programming rights.¹³⁸

Precisely for the reasons described in the quoted language, GSN is disadvantaged by Cablevision's conduct in the sense that it receives less in license fees, and it is harder for GSN to attract advertisers and compete for programming rights.

138. *Tennis Channel Initial Decision* ¶80; *Tennis Channel Order* ¶¶12, 21, 27.

A. Forgone License Fees

80. The most obvious harm inflicted by Cablevision's discriminatory carriage policy is GSN's forgone license fees. According to GSN's billing records, GSN lost approximately [REDACTED] in the first month after the tiering episode.¹³⁹ The decline in revenue means that GSN has less ability to invest in the network, including the acquisition of new programming.

B. Forgone Advertisements

81. Another source of harm attributable to Cablevision's discriminatory carriage is forgone advertising. GSN estimates that each subscriber accounts for, on average, [REDACTED] per year to advertising sales.¹⁴⁰ According to GSN, the loss of a subscriber would generate [REDACTED].¹⁴¹ Based on GSN's estimate, the short-term monthly loss in advertising revenues in the New York-New Jersey-Connecticut area is approximately [REDACTED]. That amounts to approximately [REDACTED] per year.

C. Impaired Ability to Secure Other Carriage Arrangements

82. The effects of Cablevision's discrimination go beyond the number of subscribers that GSN and WE tv have on Cablevision's systems. Other vertically integrated cable operators carry WE tv on highly penetrated tiers (most likely pursuant to formal or informal reciprocal carriage arrangements¹⁴²) and it is reasonable to conclude that Cablevision's decision to limit

139. See GSN Exh. 176 [REDACTED]

140. Goldhill Testimony, ¶30; *Goldhill Declaration*, ¶16.

141. *Id.*

142. Vertically integrated cable operators have been recognized to enter into reciprocal carriage agreements. See Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks*, Indiana University Working

GSN's distribution might negatively influence the decisions of other cable operators with which GSN does business. For example, as news of the tiering episode permeates through the distributors, the press, and rival programming suppliers, the long-term value of a tiered network could be adversely affected. Consequently, Cablevision's broad carriage of WE tv combined with its narrow carriage of GSN could contribute to an even broader gap after all distributors are taken into account.¹⁴³ Indeed, [REDACTED]

[REDACTED].¹⁴⁴ Not only would a tiering affect carriage decisions among other distributors, but according to WE tv, it also [REDACTED]

[REDACTED]¹⁴⁵

83. Assuming there is a reciprocal-carriage arrangement by which another vertically integrated cable operator mimicked Cablevision's carriage choices with respect to independent networks,¹⁴⁶ such an arrangement would harm GSN on its face. But even assuming there are no

Paper (Aug. 30, 2005) at 18 ("The marginal effect of [an indicator variable for a local cable system that is not integrated with the start-up cable network in question but integrated with other cable networks] indicates that a vertically integrated cable system is approximately 4 percent points more likely than non-vertically integrated cable systems to carry the start-up basic cable networks of *other* MSOs.") (emphasis added). Moreover, Kang rejects the alternative hypothesis that a vertically integrated cable system has a general tendency to carry more cable networks generally, including those owned by other MSOs. *Id.* at 19 ("The estimated coefficients of [an indicator variable that the owner of cable system owns vertically integrated cable networks] and [the number of cable networks owned by the owner of a cable system] are not found to be positive and statistically significant in any model. The results thus support the reciprocal carriage hypothesis by indicating that a vertically integrated cable system is at least no more likely to carry non-vertically integrated independent cable networks than does a non-vertically integrated cable system.").

143. [REDACTED]
[REDACTED] Hopkins Testimony, ¶22.

144. GSN Exh. 10 [REDACTED]

145. GSN Exh. 165.

146. Jun-Seok Kang, *Reciprocal Carriage of Vertically Integrated Cable Networks*, Indiana University Working Paper (Aug. 30, 2005) at 4 ("The rationale of the FCC is that MSOs have incentives to carry each others' vertically integrated cable networks; furthermore, such carriage behaviors will lead to the collective denial of non-vertically integrated independent start-up cable networks."). The record indicates that Cablevision [REDACTED]

such reciprocal-carriage agreements, there are at least two mechanisms by which Cablevision's carriage decision of GSN could influence the decision of other (non-overlapping) cable operators. *First*, another cable operator could cite to Cablevision's sports-tier carriage of GSN as a basis for similar treatment during a negotiation with GSN.¹⁴⁷ Because Cablevision is the nation's fifth largest cable operator, ninth largest MVPD,¹⁴⁸ and largest MVPD in the coveted New York DMA, Cablevision's carriage of an independent network could influence the decision of other cable operators. *Second*, suppose Cablevision and another cable operator (for example, Time Warner) operated in close geographic proximity in the New York DMA, and both competed against an overbuilder like Verizon within their respective footprints. In the absence of Cablevision's conduct, Verizon could be compelled to carry GSN on a widely distributed tier, which in turn could compel Time Warner to follow in its overlapping territory with Verizon.

84. Finally, that there may be no evidence of a decline in the carriage of GSN by other MVPDs since Cablevision decision to tier GSN is not informative. Cablevision's repositioning of GSN happened relatively recently, and it is unrealistic to expect the rest of the

[REDACTED] . See, e.g., Exh. 112
 [REDACTED] ; GSN Exh. 98
 [REDACTED] GSN Exh. 39; GSN Exh. 34
 [REDACTED]
 [REDACTED] ; GSN Exh. 28
 [REDACTED] GSN Exh. 27
 [REDACTED] See GSN Exh. 29
 [REDACTED]

147. *Tennis Channel Initial Decision* ¶63 (“First, the distribution decisions of other MVPDs do not establish that Comcast Cable’s carriage of Tennis Channel on the Sports Tier is a result of a legitimate, non-discriminatory business decision because Comcast Cable’s distribution of Tennis Channel has an influence on the distribution decisions of other MVPDs. Substantial record evidence shows that MVPDs are influenced by the carriage decisions of other MVPDs. Thus, when one MVPD carries a network at a particular level of distribution...that makes it more likely that other MVPDs will carry the network at the same level of distribution.”). *Tennis Channel Order* ¶¶19, 85.

148. National Cable & Telecommunications Association, “Top 25 Multichannel Video Programming Distributors as of June 2011,” <http://www.ncta.com/Stats/TopMSOs.aspx>.

industry to change its carriage arrangements overnight, particularly to the extent that those arrangements are covered by existing contracts with terms that expire over the course of a period of time. As GSN's contracts come up for renewal, however, other cable operators might consider Cablevision's retiering and use it to GSN's detriment in bargaining. [REDACTED]

149

D. Inability to Compete for Advertisers and Viewers

85. As a consequence of Cablevision's discriminatory tiering policy, GSN is restrained in its ability to compete effectively for viewers and advertisers. According to economic theory, Cablevision should be able to increase subscribership and advertising revenues for its own programming content by disadvantaging GSN. GSN and WE tv need not be perfect substitutes to generate these effects.

86. As long as GSN's footprint contains a hole in the coveted New York market, GSN is restrained in its ability to compete effectively for advertisers, many of which view coverage in the New York market [REDACTED]

[REDACTED]¹⁵⁰ Indeed, economic research has shown that gaps in a network's coverage area have grave consequences for advertising revenues.¹⁵¹ According to SNL Kagan, Cablevision supplied nearly [REDACTED] of all video subscribers in the New York DMA in the second quarter of 2011.¹⁵² And the New York DMA accounts for between [REDACTED] of

149. Hopkins Testimony, ¶22.

150. *Goldhill Declaration*, ¶17 [REDACTED].

151. Chen & Waterman, *supra*, at 230 ("For an ad-supported basic cable network, moreover, cost-per-thousand advertising rates are known to be an increasing function of the network's national audience reach, and advertisers regard geographic gaps in the national audience coverage of a given network to be a serious disadvantage. In this case, strategic vertical foreclosure may thus compound a rival network's disadvantage in offering a competitive quality of programming") (citations omitted).

152. [REDACTED]

all television households in the United States.¹⁵³ Finally, [REDACTED]

[REDACTED]¹⁵⁴

87. Further, the impact of Cablevision’s retiering appears to have been felt beyond the New York market. In particular, I analyzed the effect of Cablevision’s retiering on an important subset of GSN’s advertising sales that was vulnerable—upfront and scatter sales. These “general rate” advertisements accounted for [REDACTED] of GSN’s total advertising revenue from 2004 through the tiering date; the remainder was comprised of “direct response” ads, which require viewers to dial back the advertiser to consummate a purchase, and infomercials. Unlike its data for “direct response” advertising, which combines local and national sales prior to 2010,¹⁵⁵ I understand that GSN’s data for “general rate” advertising sales include only national advertising accounts.¹⁵⁶ (GSN’s data for infomercials include only national accounts as well.) If the retiering affected GSN’s general-rate advertising sales in the New York DMA only, then one would expect GSN’s general-rate advertising to decline by at most [REDACTED] after the tiering. But the actual decline in general-rate advertising attributable to tiering appears to be much larger ([REDACTED]).¹⁵⁷

153. [REDACTED]

154. See GSN Exh. 24 [REDACTED]

[REDACTED] See also GSN Exh. 165, [REDACTED]

155. [REDACTED]

[REDACTED] See also GSN Exh. 174.

156. I am therefore limited in my ability to estimate whether the retiering affected GSN’s national, direct-response advertising sales. The tiering likely did not affect local, direct-response advertising sales outside of the New York DMA.

157. That GSN’s average advertising rates [REDACTED] is not evidence of the lack of harm from the tiering, as suggested by Mr. Orszag. The relevant question is not whether

88. To estimate the impact of the tiering on GSN's general-rate advertising revenues, I estimated a regression model, which controls for quarterly effects, a time trend (linear and squared), growth of gross domestic product (GDP), and GSN's all-day household television national ratings.¹⁵⁸ The model was fit to 34 quarters of data through the second quarter 2012. The in-sample predictive power of the model is very high; the model explains [REDACTED] of the variation in GSN's general-rate advertising over this time horizon. As expected, [REDACTED]

[REDACTED]

[REDACTED]. Table 9 shows the results.

GSN's ad rates went up (or down), but rather whether they would have gone up by more *but for the tiering*. When constructing a damages model, an economist must construct the relevant benchmark; the pre-tiering period does not serve as the proper benchmark because other factors that influence GSN's advertising rates have changed. By the same logic, that GSN's cash flow margins, income from operations, affiliated fee revenue, or net advertising revenue increased from 2010 to 2011 is not proof of lack of harm. *Orszag Report*, ¶¶146-47. For example, total advertising revenue is a function of many things not affected by the tiering, including local advertising sales outside of New York; this is why I focused on national general-rate sales. Under Mr. Orszag's test, no growing or profitable network could ever bring a discrimination claim; only networks that limp into the Commission would be eligible for protection from discrimination.

158. To control for the Gambling Control Commission's June 2011 investigation of certain online poker websites—some of which were significant purchasers of general-rate advertising on GSN—I exclude all advertising revenues related to poker throughout the entire time series. As it turns out, there were no poker-related advertisers in GSN's ad database after the third quarter of 2011.

TABLE 9: REGRESSION RESULTS - GSN GENERAL RATE (UPFRONT & SCATTER)
QUARTERLY ADVERTISING SALES, 1Q 2004 – 3Q 2012

Explanatory Variable	Coefficient	p-value
<i>Tiering Dummy</i>		
<i>Time Trend</i>		
<i>Time Trend squared</i>		
<i>GDP Growth</i>		
<i>National Ratings</i>		
<i>Quarter = 2</i>		
<i>Quarter = 3</i>		
<i>Quarter = 4</i>		
<i>Constant</i>		
<i>r2</i>		
<i>N</i>		

Note: * for p<.05, ** for p<.01, and *** for p<.001.

Sources: GSN Exh. 174, [REDACTED]

As Table 9 shows, the coefficient on the tiering variable is [REDACTED] and statistically significant at the five-percent level (the p-value is slightly over one percent, implying that it is almost significant at the one percent level). This result demonstrates that, controlling for other things that affect GSN's general-rate advertising, Cablevision's tiering is associated with a [REDACTED]

[REDACTED]. This result is robust to changes in regression specification.¹⁵⁹ The same result is obtained in an analysis of GSN's combined generate-rate advertising and infomercials (which are also sold nationally),¹⁶⁰ and the combined results are also robust to changes in specifications. Although it possible that GSN's direct-response advertising [REDACTED]

159. For example, I used alternative measures of ratings from specific DMAs such as Philadelphia and Los Angeles.

160. The coefficient on the tiering dummy in the combined regression is equal to [REDACTED] and is significant at the one-percent level.

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89. Finally, because of Cablevision’s discriminatory carriage of GSN, the network also is restrained in its ability to compete effectively for viewers; cable programming is an “experience good”¹⁶² that can best be learned about while surfing the channels. It is impossible to gain that experience if a network is available only on a sports tier, to which a consumer must affirmatively subscribe. In contrast, Cablevision subscribers can gain experience with WE tv casually, as that network is available to them without the need to subscribe to a sports tier.

90. This discussion is not mean to suggest that all coverage gaps are debilitating to an independent network, as that is the wrong benchmark. As Judge Sippel explained in his recent decision:

[I]t is not necessary for a network to show that its very survival is imperiled in order to satisfy its burden of showing that an MVPD’s actions favoring affiliated networks had unreasonably restrained its ability to compete fairly.¹⁶³

Thus, the relevant benchmark is GSN’s performance in a world without the challenged conduct; here, it is clear that GSN has been impaired due to significant subscriber losses in New York and based on a broader negative impact on its performance in terms of advertising revenues.¹⁶⁴

161. Based on Feb. 21, 2013 conversation with Donna Vecchio and Marla Donna, directors of advertising pricing and planning at GSN.

162. The idea of “experience goods” dates back to a 1970 paper showing that it was more difficult to determine utility associated with quality than with price and that certain goods must be used before such a determination can be made. *See* Philip Nelson, “Information and Consumer Behavior,” 78 *J. Pol. Econ.* 311 (1970). Since then, experience goods have been formalized to be goods for which consumers do not know their preferences before consumption. This concept has been applied to a variety of industries, most notably retail goods including electronics, appliances, clothing, food, and toys. *See* Yeon-Koo Che, “Customer Return Policies for Experience Goods,” 44 *J. Ind. Econ.* 17, 18 (1996); Douglas Gale & Robert Rosenthal, “Price and Quality Cycles for Experience Goods,” 25 *Rand J. Econ.* 590 (1994); Carl Shapiro, “Optimal Pricing of Experience Goods,” 14 *Bell J. Econ.*, 497 (1983).

163. *Tennis Channel Initial Decision* ¶92.

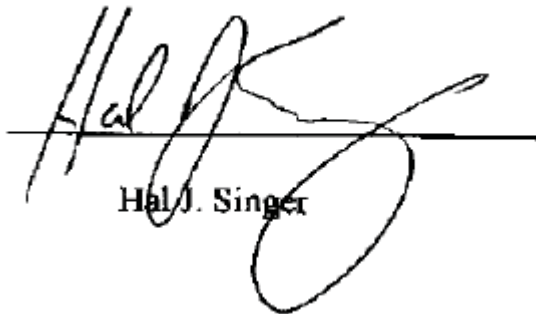
164. Mr. Orszag mischaracterizes my prior testimony in NFL. I never testified that that a firm must be foreclosed from 20 percent of a market for an action to be “presumptively anticompetitive.” Rather, I was reciting the relevant foreclosure thresholds from the antitrust literature, which are more rigorous than the thresholds needed

CONCLUSION

91. Based on the data I have reviewed to date, I conclude that Cablevision's refusal to carry GSN on a highly penetrated tier on Cablevision's cable systems likely constitutes discrimination based on affiliation. I also conclude that Cablevision's conduct has impaired GSN's ability to compete vis-à-vis Cablevision's affiliated, women's programming networks for programming, advertisers, viewers, and multi-channel video programming distributors.

* * *

I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed on March 12, 2013.



Hal J. Singer

to show competitor harm. That those higher thresholds for consumer harm were met in NFL and are not met here is irrelevant. Similarly, Mr. Orszag claims that a "fair reading" of my Tennis Channel testimony implies that networks with more than 40 million subscribers are immunized from harm. I said no such thing. Rather, I noted that dropping below 40 million subscribers (from a tiering episode) was more debilitating for a network, all things equal. It might be the case that losing access to customers in the coveted New York market with a subscriber base of less than 40 million is more debilitating than losing access to those customers with a subscribership base of more than 40 million. But that does not imply that GSN suffered no impairment.

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CURRENT EMPLOYMENT

NAVIGANT ECONOMICS, Washington, D.C.: Managing Director, 2010-present.

EMPLOYMENT HISTORY

GEORGETOWN UNIVERSITY, McDONOUGH SCHOOL OF BUSINESS, Washington, D.C.: Adjunct Professor, 2010.

EMPIRIS, L.L.C., Washington, D.C.: Managing Partner and President, 2008-2010.

CRITERION ECONOMICS, L.L.C., Washington, D.C.: President, 2004-2008. Senior Vice President, 1999-2004.

LECG, INC., WASHINGTON, D.C.: Senior Economist, 1998-99.

U.S. SECURITIES AND EXCHANGE COMMISSION, OFFICE OF ECONOMIC ANALYSIS, WASHINGTON, D.C.: Staff Economist, 1997-98.

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AUTHORED BOOKS AND BOOK CHAPTERS

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2. *Can Broadband Power an Economic Recovery?*, ADVANCED COMMUNICATIONS LAW & POLICY INSTITUTE AT NEW YORK LAW SCHOOL, Washington, D.C., July 10, 2012.
3. *Using Regression in Antitrust Cases*, UNIVERSITY OF PENNSYLVANIA LAW SCHOOL, Philadelphia, PA., April 12, 2012.
4. *Mergers: The Road to Duopoly or Path to Competitive Panacea?* NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS, Los Angeles, CA., July 20, 2011.
5. *State of the Mobile Net*, CONGRESSIONAL INTERNET CAUCUS, Washington, D.C., May 27, 2011.
6. *Waves of Innovation: Spectrum Allocation in the Age of the Mobile Internet*, INFORMATION TECHNOLOGY & INNOVATION FOUNDATION, Washington D.C., May 17, 2011.
7. *With or Without Merit, Class Certification Requires Commonality*, ABA SECTION OF ANTITRUST LAW 59TH ANNUAL SPRING MEETING, Washington, D.C., Mar. 30, 2011.
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9. *Jobs and Technology*, NEW DEMOCRATIC LEADERSHIP COUNCIL, Washington, D.C., Sept. 22, 2010.
10. *Regulation and Broadband*, ADVANCED COMMUNICATIONS LAW & POLICY INSTITUTE, NEW YORK LAW SCHOOL, New York, N.Y., July 14, 2010.

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15. *Second Life Settlements & Longevity Summit*, INSURANCE-LINKED SECURITIES & LIFE SETTLEMENTS, New York, N.Y., Sept. 30, 2009.
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19. *Standard Setting and Patent Pools*, LAW SEMINARS INTERNATIONAL, Arlington, VA., Oct. 3, 2008.
20. *The Changing Structure of the Telecommunications Industry and the New Role of Regulation*, INTERNATIONAL TELECOMMUNICATIONS SOCIETY BIENNIAL CONFERENCE, Montreal, Canada, June 26, 2008.
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22. *Merger Policy in High-Tech Industries*, GEORGE MASON UNIVERSITY SCHOOL OF LAW, Washington, D.C., Feb. 1, 2008.
23. *Telecommunications Symposium*, U.S. DEPARTMENT OF JUSTICE ANTITRUST DIVISION, Washington, D.C., Nov. 29, 2007.
24. *Wireless Practice Luncheon*, FEDERAL COMMUNICATIONS BAR ASSOCIATION, Washington, D.C., Nov. 29, 2007.
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29. *Annual Conference*, WIRELESS COMMUNICATIONS ASSOCIATION INTERNATIONAL, Washington, D.C., June 27, 2006.
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APPENDIX 2: CORRECTIONS TO MR. ORSZAG’S “DIRECT TEST”

1. To conduct his “direct test” of substitution from GSN to WE tv, Mr. Orszag employed the following regression model:

$$\begin{aligned} WetvShare_{2011} = & \beta_0 + \beta_1 WetvShare_{2010} + \beta_2 WetvDuration_{2010} + \beta_3 TotalDuration_{2010} + \beta_4 GSNShare_{2010} \\ & ... + \beta_5 SportsTier_{2010} + \beta_6 AddedAfter2007 + \beta_7 GSN_{2011} * GSNShare_{2010} + \beta_8 WetvDurationPositive_{2010} \\ & ... + ServiceTierFixedEffects_{2010} + ServiceTierFixedEffects_{2011} + \varepsilon \end{aligned}$$

2. The dependent variable in Mr. Orszag’s model is the WE tv monthly household viewership share as of April 2011, or $WetvShare_{2011}$. The model attempts to explain WE tv viewership in 2011 as a function of several variables, including the household’s monthly GSN viewership share as of April 2010 (denoted $GSNShare_{2010}$), and an interaction term ($GSN_{2011} * GSNShare_{2010}$). The interaction term is the product of $GSNShare_{2010}$ and an indicator for whether the household received GSN in April 2011 (denoted GSN_{2011}). Mr. Orszag uses the interaction term to interpret the results of [REDACTED] The interaction term divides households into the control group and the treatment group. The interaction term measures the extent to which WE tv viewership after the retiering differs between households in the control group and the treatment group, after controlling for other factors.¹⁶⁵

3. Even within the confines of his own (flawed) regression model, Mr. Orszag’s results suggest that GSN’s retiering induced even some households in the treatment group to increase their viewership of WE tv in 2011 (despite the likelihood that such households are non-GSN Loyalists).¹⁶⁶ Mr. Orszag incorrectly characterizes this result as indicating that the effect of

165. Specifically, a negative coefficient on the interaction term would indicate that WE tv viewership after the retiering was lower for households in the control group than for households in the treatment group, which would indicate a propensity to substitute from GSN to WE tv. To reiterate, such substitution could only occur among the treatment group, which is disproportionately comprised of non-GSN Loyalists.

166. [REDACTED]

Cablevision's retiering on WE tv viewership is "negligible from an economic perspective."¹⁶⁷ Mr. Orszag reaches this conclusion because his model suggests that the retiering of GSN increased WE tv's average share of household viewership by approximately [REDACTED], or about [REDACTED] per household per day (or approximately [REDACTED] per household in the treatment group). But note that households in the treatment group viewed only about [REDACTED] (equal to [REDACTED] of average GSN viewership in April 2010 by the treatment group divided by 30 days) of GSN programming per household per day before the retiering. Thus, Mr. Orszag's model suggests that even households in the treatment group, with relatively modest preferences for GSN, transferred roughly [REDACTED] (equal to [REDACTED] per household in the treatment group divided by the product of [REDACTED] of average GSN viewership and [REDACTED]) of their viewing from GSN to WE tv after the retiering.

4. In April 2011, the average household in Mr. Orszag's control group viewed approximately [REDACTED] of GSN, and approximately [REDACTED] of WE tv. If households in the control group had been exposed to the retiering, and if they had transferred just [REDACTED] of their viewing from GSN to WE tv as a result, then WE tv viewership for the control group would have increased by approximately [REDACTED] in 2011, from approximately [REDACTED] to approximately [REDACTED] (equal to [REDACTED] of WE tv viewership in April 2011 plus the product of one percent and [REDACTED] of GSN viewership in April 2011 by the control group). Of course, had they been exposed to the retiering, households in the control group likely would have transferred a higher percentage of their viewing hours to WE tv, given their revealed preferences for programming such as GSN.

167. *Orszag Report*, ¶29. Although Mr. Orszag suggests this lift was [REDACTED], WE tv's lift from the tiering ranked [REDACTED] among 87 networks, suggesting that the two networks are relatively close from the perspective of viewers.

For example, if viewers in Mr. Orszag’s control group had transferred just [REDACTED] of their GSN viewership to WE tv, then WE tv viewership among these households would have increased by approximately [REDACTED].

5. Setting aside the fundamental problem of self-selection into the control group, Mr. Orszag’s regression specification also contains explanatory variables that are potentially correlated with unobserved household-specific characteristics, and are therefore potentially “endogenous” to the regression equation. The classic example of endogeneity is the use of prices to predict quantities purchased; if prices themselves are influenced by quantities purchased (a phenomenon known as “simultaneity”), then the true relationship between prices and quantities cannot be estimated using standard regression techniques.¹⁶⁸ The endogeneity here arises because Mr. Orszag [REDACTED]
[REDACTED]. To the extent that unobserved, household-specific factors determined households’ WE tv viewership shares in both 2010 and 2011, the explanatory variable *WEtvShare₂₀₁₀* is endogenous to the regression equation. The same logic applies to the explanatory variable *WEtvDurationPos₂₀₁₀*, which indicates whether the household viewed any amount of WE tv in 2010, as well as *WEtvDuration₂₀₁₀*, which measures each household’s 2010 duration of WE tv viewing (in minutes).

6. To illustrate the potential effects of endogeneity, [REDACTED]
[REDACTED]
[REDACTED]

168. One of the fundamental assumptions of ordinary least square (OLS) regression is that the errors in the regression have conditional means—that is, means given information about the independent variables—of zero. One immediate consequence of this assumption is the independent variables are uncorrelated with the errors. When this assumption is violated, the OLS estimates are biased.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

169. Applying Mr. Orszag's calculation method, the specification in column (2) suggests that the retiering of GSN increased WE tv's average share of household viewership by approximately [REDACTED] percentage points, or about [REDACTED] per household per day, equal to approximately [REDACTED] per household in the treatment group. This implies that households in the treatment group transferred approximately [REDACTED] of their GSN viewing to WE tv as a result of the retiering. If households in the control group had transferred the same percentage, then WE tv viewership within the control group would have increased by approximately [REDACTED].

170. That there was only one chance in a thousand this result could have happened by coincidence implies a 0.1 percent level of statistical significance. For many applications, the level of statistical significance of five or ten percent is chosen by convention.

TABLE A-1: MODIFICATIONS TO MR. ORSZAG'S MODEL

Dependent Variable	(1) <i>WetvShare</i> ₂₀₁₁ [Orszag]	(2) <i>WetvShare</i> ₂₀₁₁ [Singer]	(3) <i>WetvShare</i> ₂₀₁₁ [Singer]	(4) Δ <i>WetvShare</i> [Singer]
<i>ΔGSNShare</i>				
<i>GSN</i> ₂₀₁₁				
<i>WetvShare</i> ₂₀₁₀				
<i>WetvDuration</i> ₂₀₁₀				
<i>WetvDurationPos</i> ₂₀₁₀				
<i>TotalDuration</i> ₂₀₁₀				
<i>GSNShare</i> ₂₀₁₀				
<i>GSN</i> ₂₀₁₁ * <i>GSNShare</i> ₂₀₁₀				
<i>SportsTier</i> ₂₀₁₀				
<i>AddedAfter2007</i>				
<i>Intercept</i>				
<i>Service Tier Fixed Effects?</i>				
<i>Observations</i>				
<i>R-Squared</i>				

Note: *p*-values reported below coefficient estimates, based on robust standard errors. Stars (*) represent significance thresholds: * for *p*<.10, ** for *p*<.05, and *** for *p*<.01. Coefficients on fixed effects suppressed.

In the fourth column of Table A-1, I estimate a modified version of Mr. Orszag's model, in which the dependent variable is set equal to the *change* in a household's viewership share of WE tv from 2010 to 2011 (denoted Δ *WetvShare*). In addition, I included a new independent variable equal to the change in GSN viewership from 2010 to 2011 (denoted Δ *GSNShare*). The modified model includes all of the control variables that Mr. Orszag included in his own model. In addition, I allow the indicator variable *GSN*₂₀₁₁ to enter separately in the model. This allows the household's predicted change in WE tv viewership from 2010 to 2011 to differ between households in the "control group" and those in the "treatment group."

7. The coefficient of interest in column four is the coefficient on $\Delta GSNShare$, which measures the extent to which a decrease in GSN viewership after the retiering is statistically associated with an increase in WE tv viewership, after controlling for all other factors. Because the dependent variable is now measured as the household-specific *change* in We tv viewership, the results cannot be informed by (potentially endogenous) unobserved household-specific characteristics that remain fixed over time.

8. As seen in Table A-1, the corrected model explains [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁷¹ It bears noting, however, that even these “corrected” specifications are incapable of identifying the relevant substitution patterns, given that we do not observe how households in the “control” group (with strong preferences for GSN) would have responded when deprived of GSN access.

171. The specification in column (4) suggests that WE tv viewership would have been approximately [REDACTED] higher if all households’ GSN viewership shares had fallen to zero in 2011, relative to a world in which all households’ GSN viewership shares remained constant from 2010 to 2011.

APPENDIX 3: CORRECTIONS TO MR. ORSZAG’S PREDICTION MODELS FOR S&E ADDITIONS AND CHURN

1. In this section, I demonstrate how Mr. Orszag’s S&E additions and churn models, once corrected for technical deficiencies, imply that Cablevision may have incurred a loss from tiering GSN.

A. Incremental S&E Subscriptions

2. In Appendix G of his report, Mr. Orszag [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] [REDACTED] Based on the difference between these

two predicted probabilities, Mr. Orszag estimates that approximately [REDACTED] S&E tier subscribers could be attributed to the retiering of GSN.¹⁷²

3. The fundamental problem with Mr. Orszag's analysis is that Cablevision [REDACTED]. Accordingly, Mr. Orszag's analysis cannot be used to infer (as he does) that GSN's retiering yielded an additional [REDACTED] S&E tier subscribers: [REDACTED], this figure presumably would have been substantially lower. Yet Mr. Orszag makes no attempt to account for [REDACTED] [REDACTED]—even though Cablevision recorded [REDACTED] [REDACTED].¹⁷³

4. Even setting this problem aside, Mr. Orszag's model substantially overestimates incremental S&E subscribership attributable to S&E's retiering. Specifically, Mr. Orszag's [REDACTED] [REDACTED].¹⁷⁴ In addition, Mr. Orszag [REDACTED] [REDACTED].¹⁷⁵

5. In Table A-2 below, I present modified versions of Mr. Orszag's model. Column (1) reproduces the results from Mr. Orszag's specification. In column (2), I replace $GSN \geq 1hr_{2010}$ with $GSNDur_{2010}$, which measures the duration (in minutes) of the household's GSN viewership in April 2010. In column (3), I replace $GSN \geq 1hr_{2010}$ with $GSNShare_{2010}$, which measures the

172. [REDACTED]

173. GSN Exh. 182.

174. Mr. Orszag [REDACTED] See [REDACTED]

175. [REDACTED]

household's monthly GSN viewership share in April 2010. In both columns (2) and (3), I also include service tier fixed effects for 2011.

TABLE A-2: MODIFICATIONS TO MR. ORSZAG'S MODEL OF 2011 S&E SUBSCRIBERSHIP

Explanatory Variable	(1) <i>Pr(S&E₂₀₁₁)</i> [Orszag]	(2) <i>Pr(S&E₂₀₁₁)</i> [Singer]	(3) <i>Pr(S&E₂₀₁₁)</i> [Singer]
<i>GSN₂₀₁₀</i>			
<i>GSN ≥ 1hr₂₀₁₀</i>			
<i>GSNDur₂₀₁₀</i>			
<i>GSNShare₂₀₁₀</i>			
<i>SportsTier₂₀₁₀</i>			
<i>SportsTier₂₀₁₀ * GSN ≥ 1hr₂₀₁₀</i>			
<i>SportsTier₂₀₁₀ * GSNDur₂₀₁₀</i>			
<i>SportsTier₂₀₁₀ * GSNShare₂₀₁₀</i>			
<i>AddedAfter2007</i>			
<i>TotalDuration₂₀₁₀</i>			
<i>Intercept</i>			
<i>2010 Service Tier Fixed Effects?</i>			
<i>2011 Service Tier Fixed Effects?</i>			
<i>Observations</i>			
<i>Pseudo R-Squared</i>			
<i>Predicted S&E Increase</i>			

Note: *p*-values reported below coefficient estimates, based on robust standard errors. Stars (*) represent significance thresholds: * for *p*<.10, ** for *p*<.05, and *** for *p*<.01. Coefficients on fixed effects suppressed.

As seen in the Table, the modified models have “goodness of fit” values (as measured by the pseudo R-squared) of [REDACTED], versus [REDACTED] for Mr. Orszag's specification. In addition, the coefficients on those variables that are included in all three of the models (such as *GSN₂₀₁₀*) are [REDACTED]. Most significantly, for each of the two modified models, I computed the predicted increase in S&E tier subscribership that is attributable to the retiering, following the same method employed by Mr.

Orszag. Thus, for column (2), I compared the predicted probability of S&E subscribership based on each household's actual characteristics, and also based on the counterfactual assumption that each household had not viewed any GSN in 2010 (*i.e.*, setting $GSNDur_{2010}$ and $GSNDur_{2010} * SportsTier_{2010}$ equal to zero for all households). Based on the difference between these two predictions, I estimated the number of incremental S&E subscriptions that can be attributed to GSN's retiering, again following Mr. Orszag's method of calculation. I repeated the same process for column (3), this time employing a counterfactual in which each household's GSN viewership share is set equal to zero in 2010.

6. The final row of the table indicates that the predicted increase in S&E subscribership is [REDACTED]: Regardless of whether GSN viewership is denominated in minutes or in viewership share, the results in columns (2) and (3) indicate that GSN's retiering is predicted to [REDACTED] to the S&E tier by only about [REDACTED], relative to the [REDACTED] predicted by Mr. Orszag. These results indicate that GSN's retiering caused [REDACTED] to migrate to the S&E tier than would be suggested by Mr. Orszag's specification. Moreover, that Cablevision [REDACTED] suggests that virtually all of the incremental S&E subscribership that Mr. Orszag's methodology would mistakenly attribute to GSN's retiering was, in reality, [REDACTED].

B. Customer Churn

7. In Appendix F of his report, Mr. Orszag [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]. Accordingly, Mr. Orszag opines that [REDACTED]

[REDACTED]¹⁷⁷

8. Mr. Orszag's analysis of customer churn is fundamentally contaminated, given that Cablevision [REDACTED]

[REDACTED]. This implies that the very subscribers who revealed the strongest preferences for GSN—and therefore would have been most likely to churn in its absence—[REDACTED]

[REDACTED]. This source of bias calls Mr. Orszag's entire analysis into question.

9. In Table A-3 below, I (partially) correct for this bias by removing customers who upgraded to the S&E tier in 2011 ([REDACTED]) from the

176. Mr. Orszag's report actually indicates [REDACTED]
[REDACTED]
However, [REDACTED].

177. [REDACTED].

analysis. I emphasize that this is only a partial correction, given that the remaining observations will contain [REDACTED]

[REDACTED]. In addition, rather than grouping all households that viewed more than one hour of GSN in 2010 into a single category, I also [REDACTED]

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TABLE A-3: MODIFICATIONS TO MR. ORSZAG'S MODEL OF CUSTOMER CHURN

Explanatory Variable	(1) <i>Pr(Churn)</i> [Orszag]	(2) <i>Pr(Churn)</i> [Singer]	(3) <i>Pr(Churn)</i> [Singer]	(4) <i>Pr(Churn)</i> [Singer]
<i>GSN ≥ 1hr₂₀₁₀</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>GSNDur₂₀₁₀</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>GSNShare₂₀₁₀</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>SportsTier₂₀₁₀</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>AddedAfter2007</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>TotalDuration₂₀₁₀</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>Intercept</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>2010 Service Tier Fixed Effects?</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>Drop Those Who Added S&E?</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>Observations</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>Pseudo R-Squared</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
<i>Predicted Churn</i>	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Note: *p*-values reported below coefficient estimates, based on robust standard errors. Stars (*) represent significance thresholds: * for $p < .10$, ** for $p < .05$, and *** for $p < 0.01$. Coefficients on fixed effects suppressed.

As seen in Table A-3, the coefficients on the various metrics of GSN viewership [REDACTED]

178. Mr. Orszag performed robustness tests allowing the threshold to vary between 0.5 and 3 hours, as well as using duration to measure GSN viewership. However, his robustness tests do not employ GSN viewership share as an independent variable. See *Orszag Report*, Appendix F, ¶4 (n. 211).

[REDACTED]

10. For each of the specifications in Table A-3, I estimated the amount of churn that can be attributed to GSN's retiering as follows: First, I used each household's actual characteristics to predict each household's probability of churning. Second, I estimated each household's probability of churning under the counterfactual assumption that the relevant GSN viewership metric was set equal to zero. Based on the difference between these two probabilities, I estimated the amount of customer churn attributable to GSN's retiering.¹⁷⁹ As seen in the Table, an estimated [REDACTED] subscribers churned away from Cablevision in response to GSN's retiering.¹⁸⁰

179. When estimating customer churn, I included [REDACTED]

180. [REDACTED]
 GSN Exh. 129 [REDACTED]
 [REDACTED] ; GSN Exh. 118
 [REDACTED] ; GSN Exh. 116

See also
 sample subscriber complaint emails: GSN Exh. 117; GSN Exh. 119; GSN Exh. 139; GSN Exh. 110; GSN Exh. 113; GSN Exh. 115; GSN Exh. 117; GSN Exh. 119; GSN Exh. 126; GSN Exh. 139.

Exhibit B

Legend to Testimony of Timothy Brooks (GSN Exh. 222)

COLOR	Fed. R. Evid.
	New Analysis

March 12, 2013

Direct Testimony of Timothy Brooks

GSN Exh. 222

I. INTRODUCTION

1. I have been retained by Game Show Network, LLC to analyze data pertaining to its cable network, GSN, and competing networks affiliated with Cablevision Systems Corporation, namely WE tv and Wedding Central, as well as certain other networks.

2. Based on the data I have examined, I conclude that GSN is similar in audience appeal to WE tv, and a significant competitor to WE tv for audience and advertising, both in the New York market and nationally. I also conclude that WE tv benefited following the removal of its competitor from wide distribution on systems. These conclusions are based on national and New York-area Nielsen ratings and demographic data, including data specific to the Cablevision coverage area, as well as on data obtained from other independent third-party measurement services, including Beta Research and Gfk MRI. The data indicate that GSN and WE tv both appeal strongly to women and are very competitive in terms of their performance in standard Nielsen demographic categories (based on gender and age). GSN performs comparably to WE tv in the New York area (as well as within the Cablevision coverage area specifically) notwithstanding that Cablevision provides its affiliated networks much more favorable channel positioning. Cablevision also gave more favorable distribution to Wedding Central, a new network it owned which appears to have attracted little audience and which was discontinued after less than two years.

3. Based on my analysis, I also conclude that GSN has already been harmed by Cablevision's negative repositioning of GSN to the sports tier—a little-seen tier that is ill-suited for GSN. This harm extends to reduced audience levels, lack of exposure to important New York advertising professionals, and accompanying reduced revenue.

II. QUALIFICATIONS

4. I am an independent media consultant specializing in, among other things, television audience measurement. Since I began my private consultancy in January 2008 I have been engaged by a variety of private-sector firms and industry groups to advise them on research-related matters. Prior to 2008, I had 39 years of experience in the field of media research, most recently as Executive Vice President of Research for Lifetime Entertainment Services (2000-2007). Prior to that, I was Senior Vice President of Research for USA Networks, served as Senior Vice President/Media Research Director at NW Ayer advertising agency, and held several research positions at NBC-TV, the NBC Stations Division, and Westinghouse Broadcasting.

5. I have taken a leading role in industry associations, serving as chairman of the board of the Media Rating Council, which audits and accredits measurement services, including The Nielsen Company, serving as chairman of the board of the Advertising Research Foundation, which furthers the common research needs of media companies and advertisers, acting as a founding member of the Council for Research Excellence, and in leadership roles on boards and committees of other industry associations. I continue to serve on a number of research-related industry committees. I have been honored with awards from several of these organizations, including a Lifetime Achievement Award (ARF, 2008) and an award for Excellence and Integrity in Media

Research (CAB, 1995). I taught media research as an adjunct professor at C.W. Post Center, Long Island University, for nine years. Also relevant to this case, I have authored or co-authored several award-winning books, including *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*, a widely used encyclopedia of television programs.¹ I am often quoted in the press on research and programming matters. Recently I have served as an expert witness on media research and related issues, including providing testimony in *The Tennis Channel, Inc. v. Comcast Cable Communications, LLC* (2011). My full *curriculum vitae* is attached.

III. ANALYSIS OF WHETHER GSN IS SIMILARLY SITUATED WITH CABLEVISION-OWNED WE tv AND WEDDING CENTRAL

A. Description of Programming on Networks Analyzed

6. I was asked to compare GSN with the Cablevision-affiliated WE tv and Wedding Central networks, as well as with several other networks that are within GSN's competitive frame and are carried widely by Cablevision.² I am familiar with the programming on these (and many other) networks due both to my professional work within the industry, including heading the research departments of cable networks, such

¹ Tim Brooks and Earle Marsh, *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (9th ed. 2007). *The Complete Directory*, first published in 1979 and now in its 9th edition (2007), is a 1,832 page directory to more than 6,500 broadcast and cable series and also contains descriptions of the programming histories of more than 50 cable networks, including GSN and WE tv. In the course of compiling this book I personally have viewed virtually all of these series and networks. All entries were written by my co-author or myself, and I was principally responsible for the entries regarding cable networks and series. The book has been compiled and written over a more-than-30-year period and is intended for the mass audience as well as industry use. I have continued to view almost every new cable network series around the time of its premiere since the publication of the most recent edition of *The Complete Directory* in 2007.

² Wedding Central appears to have been quite similar to WE tv and GSN in terms of programming and target audience. However that network was not measured by Nielsen or most of the other sources I consulted.

as Lifetime and USA Network, and as co-author of *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present*. The following is a description of the programming of GSN, WE tv, and Wedding Central. A fuller description of their audiences and discussion of program genres will appear later.

7. GSN was launched in 1994 as “Game Show Network.” In 2004 the network shortened its identification to “GSN,” which was consistent with a move to broaden its programming to a wider range of women’s entertainment. Its programming consists primarily of competition-based shows of various types, along with other reality-based programs, that, as discussed in additional detail below, appeal to an audience that is predominantly female. Currently GSN features games in four broad categories that are well recognized in the industry:

(1) “Relationship games,” which focus on the contestants’ relationships. These include “dating games,” sexually charged games involving couples. GSN examples: *Baggage*, *The Newlywed Game*, *Love Triangle*. Each of the shows within GSN’s “Love Block” of programming, which aired in the high-profile early prime time period, falls within this category.³ Another type of relationship games emphasize families working together on challenges. GSN example: *Family Feud*.

(2) “Celebrity games,” in which celebrities playing either alone or alongside ordinary people are a major part of the appeal. GSN examples: *Match Game*, *\$25,000 Pyramid*.

³ See GSN Exh. 123 [REDACTED]

(3) “Big money games,” often guessing games where a principal appeal is the potentially large prize and the focus is on money. GSN examples: *Deal or No Deal*, *I Vs. 100*.

(4) “Quiz games,” in which the main appeal is the game itself, and the contestant relies on factual knowledge and strategy. GSN examples: *Card Sharks*, *Lingo*, *Chain Reaction*.

8. There is variety in the appearance of GSN shows. Many of the hosts are celebrities (Sherri Shepherd, Wendy Williams, Jerry Springer, Alfonso Ribeiro). In addition, GSN carries series that are not traditional “games.” Over the years, GSN has programmed more than 150 different series ranging from competition reality shows such as *The Amazing Race* and, most recently, *Dancing With The Stars*, to reality shows focusing on celebrities (*Naturally Stoned*, *Carnie Wilson: Unstapled*) and weddings (*Vegas Weddings Unveiled*).⁴ It has also aired documentaries and, recently, a Drew Carey improvisational comedy show. The common theme is that the majority of GSN’s programming is competition-based with a predominant focus on women. Given this focus on the female audience, it is not surprising that a number of core GSN programs overlap thematically with programming seen on other women’s networks, including WE tv. For example, *Love Triangle* and *Baggage* are essentially real-life talk/relationship shows, rather than traditional game shows.

9. WE tv was launched in 1997 as Romance Classics, dedicated to romantic movies and miniseries. In 2001 it was reformatted to include a broader range of women’s

⁴ See GSN_CVC_00074806.

programming and relaunched as WE: Women's Entertainment. In 2006 its name was shortened to WE tv. Like GSN, WE tv targets women by airing a range of women-oriented programming. Its limited original programming consists primarily of documentary-style reality-based shows such as *Bridezillas*, *My Fair Wedding*, *The Cupcake Girls*, *Downsized*, and *Braxton Family Values*.⁵ Many of these touch upon the same themes as GSN's relationship games—dating, romance, and family dynamics. As on GSN, celebrities have been featured on some WE tv series, among them Toni Braxton, gospel duo Mary Mary, Joan Rivers, Shannen Doherty, and comedian Sinbad. The remainder of the schedule is filled largely with sitcom and drama reruns and a few movies. WE tv has also aired competition shows similar to those on GSN, including *Weight Loss Challenge*, *Style By Jury*, and *Skating's Next Star*, as well as at least one game show, *Most Popular*, which aired during WE tv's Thursday night prime-time schedule beginning in July 2009.⁶

10. In 2009, WE tv spun off a second women's-oriented network called Wedding Central, whose schedule consisted of reruns of wedding-themed programs that had originally aired on WE tv.⁷ During its short existence, Wedding Central developed and considered scheduling wedding-themed game shows and competition programming, along with other wedding-themed programming.⁸ Cablevision gave Wedding Central

⁵ See, e.g., GSN Exh. 181.

⁶ GSN Exh. 25. I viewed *Most Popular* at the time of its premiere.

⁷ [REDACTED]
[REDACTED] See GSN Exh. 44, at CV-GSN 0225972.

⁸ See GSN Exh. 46 [REDACTED]
[REDACTED] GSN Exh. 151 [REDACTED]

(continued)

preferential treatment via wide distribution on its iO digital cable service⁹ but it achieved little carriage from other distributors. [REDACTED]

[REDACTED]¹⁰ The network was shut down in 2011.

11. I also considered GSN, WE tv, and Wedding Central within the context of other women-targeted networks that are within those networks' competitive frame and which are widely carried by Cablevision, including Bravo, E! Entertainment, Hallmark Channel, Lifetime, Oxygen and OWN.¹¹ The following are brief descriptions of those networks' programming.

Women's Networks: Programming¹²

Bravo: Female-oriented documentary-style reality shows, including *Kathy Griffin: My Life on the D-List*, *The Real Housewives*, *Millionaire Matchmaker*, *The Rachel Zoe Project*, and an occasional movie. A significant portion of Bravo's schedule has been dedicated to competition-based shows such as *Top Chef*. Much of its success in the mid 2000s is attributed to the phenomenally popular competition show *Project Runway*, which Bravo aired from 2004 to 2008.

(continued)

[REDACTED]; GSN Exh. 84
[REDACTED]; GSN Exh. 74
[REDACTED]; GSN Exh. 85
GSN Exh. 172 [REDACTED].

⁹ Thomas Ulmstead, "AMC Networks Divorces Wedding Central," *Multichannel News* (July 8, 2011) <http://www.multichannel.com/content/amc-networks-divorces-wedding-central> (accessed Sept. 11, 2011).

¹⁰ GSN Exh. 104.

¹¹ Other female-skewed networks with which GSN and WE tv might be considered competitive include [REDACTED]. See GSN Exh. 19.

¹² Brooks & Marsh, individual network entries; www.tvguide.com (accessed Sept. 25, 2011).

E! Entertainment: Primarily celebrity-oriented reality shows, including *Keeping Up with the Kardashians*, *Kendra*, *Chelsea Lately*, and *Fashion Police*, plus some female-oriented reruns (e.g. *Sex and the City*) and movies.

Hallmark Channel: Family-oriented reruns (*Golden Girls*, *Frasier*, *I Love Lucy*, *Little House on the Prairie*, *The Waltons*), family-friendly original and theatrical movies.

Lifetime: General entertainment for women, including original drama and comedy (*Army Wives*, *Drop Dead Diva*, *Sherri*, *Rita Rocks*), as well as documentary and competition-based reality programs (*Project Runway*, *Dance Moms*). It also features reruns (*Reba*, *Will & Grace*, *Desperate Housewives*, *Grey's Anatomy*) and original and theatrical movies, many dealing with women's issues. In the 1990s, Lifetime had a very successful afternoon game show block, and during my tenure at the network (2000-2007), we had many discussions about restoring traditional game shows to Lifetime's schedule.

Oxygen: The edgiest of the women's networks. Among its signature series are *Bad Girls Club* (all-catfights-all-the-time), *Love Games: Bad Girls Need Love Too* (game show spin off of *Bad Girls Club*), and *Snapped* (women who killed men). It features reality, competition, and documentary programs (*Hair Battle Spectacular*, *Tori & Dean*, *Dance Your Ass Off*) along with female-oriented theatrical movies and reruns. Since being purchased by NBC, Oxygen has also aired reruns from its parent company (*The Sing-Off*, *Law & Order*).

OWN: Oprah Winfrey's recently launched network has focused on documentary programming emphasizing self-improvement and spirituality for women. Among its series have been *Oprah Behind the Scenes*, *The Judds*, *Dr. Phil*, *Gayle King*, *Turning Point*, *Ask Oprah's All Stars*, and *Celine Dion*. It also airs a few female-oriented theatrical movies.

B. Comparison of GSN and WE tv Audiences

12. In order to analyze the audiences of GSN, WE tv and the other specified networks, I first requested that GSN provide me with data from The Nielsen Company. Reliable audience data is in my view critically important to evaluate both the overall audience strength and the demographic skew of a network. This is a widely accepted premise in the television industry. Indeed, virtually all presentations to advertisers and to MVPDs with which I was involved during my 40 years in the industry included such

data, generally from The Nielsen Company. [REDACTED]

[REDACTED]¹³

13. Nielsen is the industry standard for measurement of television audiences in the United States. It is audited and accredited by the Media Rating Council (MRC), an independent industry body consisting of buyers and sellers who use audience data. As a former chairman of the MRC, I am quite familiar with Nielsen procedures and believe its measurements to be impartial and accurate for the purposes for which I have used the data. Whether or not one shares that belief, it is clear that Nielsen is the dominant entity conducting television audience measurement in the U.S. and its data are the basic currency of trade in the television advertising marketplace.

14. Nielsen data in the form I required are available only to subscribing companies via specially installed computer access systems. I therefore specified to GSN research personnel exactly what raw data I wanted accessed, and in what form. I received from them the data as produced by the access systems (*e.g.* the Galaxy and Arianna systems), in spreadsheet form. I conducted the additional analysis and calculations to prepare this report and the tables included herein.

15. The Nielsen national ratings cited are coverage area ratings, the number of homes that tuned to each network during an average minute as a percentage of homes that receive the network (*i.e.*, the network's "coverage area"). This is an accepted method of comparison for cable networks with different distribution and is widely used for national Nielsen comparisons. Published New York market ratings are based on cable coverage

¹³ See *e.g.* GSN Exh. 137, at CV-GSN 0014313.

area, since Nielsen does not provide network-level coverage ratings on a local market basis. Cable coverage area ratings reflect the number of homes tuned to a network as a percentage of all wired cable homes in the market, whether or not the home receives the network as part of its MVPD service. In addition, in order to evaluate proprietary set-top-box data that Cablevision introduced before the Media Bureau, I asked GSN to provide me with Nielsen data specifically limited to Cablevision's coverage area (or "footprint").

16. In addition to Nielsen ratings, I used third-party data from Beta Research and Gfk MRI to shed light on the relative popularity of the television networks in question. Beta Research is the leading provider of syndicated data measuring viewer attitudes toward cable networks. MRI is another widely used syndicated service that reports, among other things, the broader attitudes of different networks' audiences. I also accessed certain publicly available information from the Internet and other sources.

17. My analysis of actual viewing audiences begins with national Nielsen data, then drills down to available local data. When national networks such as GSN and WE tv sell advertising, they do so on the basis of national Nielsen data (which is not available for all cable networks, but is available for GSN and WE tv), rather than local Nielsen data. In my experience, a national cable network like GSN or WE tv likewise looks at national Nielsen demographic data when evaluating its own performance or that of other networks in its competitive frame and, in fact, [REDACTED]

[REDACTED].¹⁴ In addition, national Nielsen data

¹⁴ See GSN Exh. 19.

provides a valuable “big picture” to understand GSN and WE tv’s relative performances. The large size of the national Nielsen sample ([REDACTED]) allows a more stable and in-depth analysis of audience demographics and a more accurate measure of the direction of ratings change and network potential than is possible with the smaller samples on which DMA ratings are based.¹⁵ In this case, [REDACTED]

18. Next, I looked at Nielsen ratings for GSN and its competitors in the New York market, which is Cablevision’s “home” market, as well as Nielsen ratings limited specifically to Cablevision’s coverage area (or “footprint”). To do this, I requested local market ratings in the form of a cut-back of data from the national Nielsen system (*i.e.*, the Nielsen Television Index or “NTI”). This is distinct from the Nielsen Station Index, known as NSI, [REDACTED]. For historical reasons NSI ratings are calculated differently and less precisely than ratings calculated by the NTI system. The NSI system assigns viewership in 15 minute increments, based on viewership of five minutes or more for each quarter hour. Thus a viewer viewing less than five minutes is not counted at all for that quarter hour, while one viewing five minutes is counted for the entire 15 minutes. In the national system, which I have used, each minute is assigned individually, producing data that is more representative of actual viewing patterns, which is our goal in this analysis.

¹⁵ A national vs. local analysis was valuable, for example, in establishing that [REDACTED]

19. Localized Nielsen ratings provide a more objective and reliable measurement of GSN's popularity relative to WE tv and other cable networks than does the set-top box data cited by Cablevision, although I also have examined the set-top box data produced by Cablevision in this case. My review of Cablevision's set-top box data indicates that [REDACTED]

[REDACTED]

[REDACTED]

(1) Nielsen National Ratings

20. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Total Audience Summary¹⁶

	Total Day		Total Day	
	HH CVG Rating		Persons 2+ CVG Rating	
	GSN	WE	GSN	WE
<u>2009</u>				
Q1				
Q2				
Q3				
Q4				
Year				
<u>2010</u>				
Q1				
Q2				
Q3				
Q4				
Year				
<u>2011</u>				
Q1				
Q2				
Y-T-D				

21. [REDACTED]

[REDACTED]

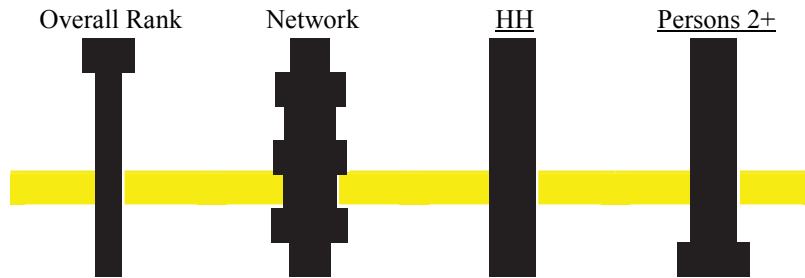
[REDACTED]

[REDACTED] 17

¹⁶ [REDACTED]

¹⁷ [REDACTED]

2010 Total Day CVG Rating¹⁸
(Ranked on HH ratings)



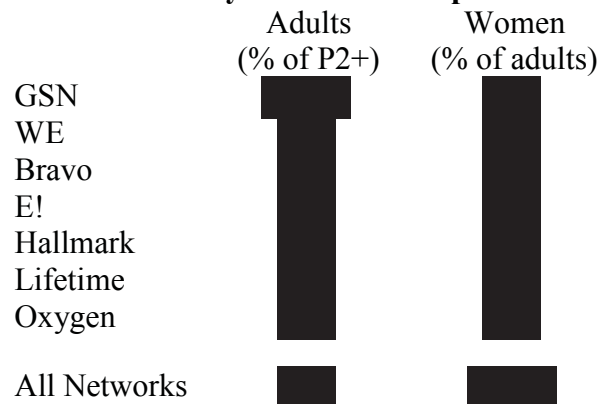
22. Another important way to compare networks is to examine their demographics. This is what advertisers look at. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹⁹

2010 Total Day Audience Composition²⁰



¹⁸ [REDACTED]

¹⁹ See GSN Exh. 166 [REDACTED]

[REDACTED] See GSN Ex. 169. [REDACTED]

See GSN Exh. 163. [REDACTED]

²⁰ [REDACTED]

See GSN Exh. 208 at 32:3-11, 32:18-22.

23. It is well understood in the business that there are female-targeted networks, male-targeted networks, and general audience networks. I have had personal experience in this regard, having among other things been head of research for Lifetime for eight years. While no network is viewed 100% by a female or male audience, ad buyers nonetheless view networks as female- or male-targeted and buy advertising inventory on that basis. For example, [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]²¹

24. Advertisers look at demographic information, such as age, on the basis of standard Nielsen demographic categories.²² The four key categories for women's

²¹ [REDACTED]

²² There are some unusual circumstances in which income is a factor, but generally only for upscale advertisers seeking networks that have high average income viewers. Such advertisers often use specialized services such as the Mendelsohn Survey of Affluent Homes to evaluate these networks. In my experience, income is not a factor generally used by advertisers in making purchases on other networks. To evaluate whether income is a factor in this case, I also have considered audience income data, which is available in different forms from Nielsen and MRI. According to the Nielsen and MRI data, [REDACTED]

(continued) See GSN Exh. 42,

networks are women 25-54, persons 25-54, women 18-49 and persons 18-49. [REDACTED]

[REDACTED]

[REDACTED]²³

GSN Advertising Sales Revenue (2010)

Women 25-54
Persons 25-54
Women 18-49
Persons 18-49

[REDACTED]

25. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]²⁵ In my experience, this is consistent with the types of advertising accounts targeted by women's networks, like WE tv and GSN: all four of these key demographic categories are important.

26. [REDACTED]

[REDACTED]

(continued)

[REDACTED] *Id.* [REDACTED]

²³

²⁴

²⁵

CV-GSN 0025453; GSN Exh. 140.

GSN Exh. 140, at CV-GSN 0014238.

New
Analysis

[REDACTED]

[REDACTED]

Total Day Ratings²⁶



27. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

28. [REDACTED]

[REDACTED]

[REDACTED] Actual time purchases

made by advertisers are made on the basis of delivery in thousands (or its equivalent, total U.S. ratings).²⁷ Any small deficiencies in delivery can be accommodated by having

²⁶

[REDACTED]

See GSN Exh. 44.

²⁷ Total U.S. ratings are calculated on the basis of audience delivered divided by the total U.S. population in that demographic.

a network provide an advertiser with somewhat more individual spots than its competitor, to make up any difference over the course of a full commercial schedule. Advertisers buy gross rating points (GRPs) for a desired demographic, so a network that has slightly lower ratings in a particular demographic can easily remain competitive by simply providing more spots in order to deliver the desired GRPs in that demographic.²⁸ This is extremely common in the industry. In terms of the environment in which the advertisements would appear, [REDACTED].

29. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

30. It is important to base this type of analysis on *shared* viewing, not all viewing. Shared viewing is the percent of combined audience of two networks that watches both. [REDACTED]

[REDACTED]

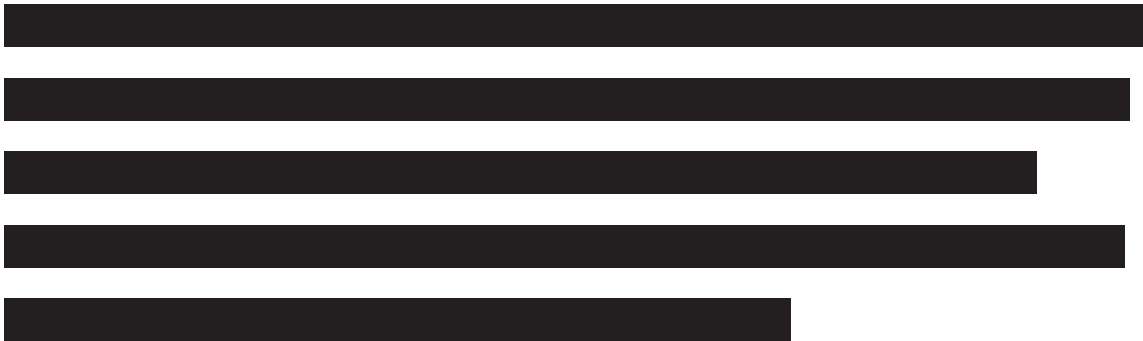
[REDACTED] [REDACTED]

[REDACTED]

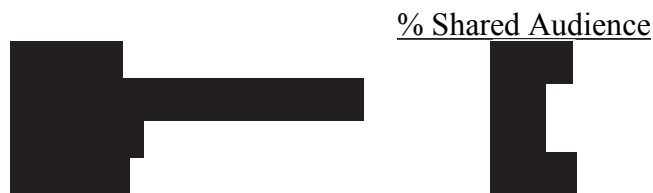
²⁸ Gross ratings points (GRP) is the mathematical total of the ratings of the individual spots in a commercial schedule. Thus if a network averaged a .10 rating among Women 18-49 and an advertiser bought ten Women 18-49 GRPs, the network could deliver that by offering a schedule consisting of 100 announcements. A competing network that averaged a .09 rating among Women 18-49 could deliver the same ten GRPs by offering a schedule of 111 announcements. In fact, since ratings fluctuate over time, the first network might have to deliver more than 100 announcements if its Women 18-49 rating slipped below .10 at the time the schedule actually ran (these are called “make-goods” or “audience deficiency units,” and are extremely common in the business).

²⁹ [REDACTED]

[REDACTED]



Top Networks With Which GSN Shares Audience (Persons 18+)³⁰
Minimum one minute shared



31. It was well understood at every network I ever worked for that if your viewers are spending a significant portion of their TV time watching a competing channel, then they are being constantly exposed to (and lured by) the promotional announcements, new shows, contests, etc. of that other channel. That channel is clearly more of a competitor to you than are channels seldom watched by *your* viewers.³¹ In the television business, shared viewing very much denotes competition.

³⁰

[REDACTED]

³¹ As a corollary to this, it is also well understood that in most cases the most effective way to build your audience is to increase the amount of viewing of your network by current viewers, not to try to lure in new viewers who have previously rejected you. This means reducing the amount of time your current viewers spend viewing other channels, *i.e.* your competitors.

32. Another Cablevision-owned network that was given preferential treatment, Wedding Central, was also [REDACTED]

[REDACTED]

[REDACTED] However in terms of overall audience acceptance, Wedding Central clearly did not perform well based on the fact that it was closed down less than two years after it was introduced and never carried on any other major MVPD besides Cablevision.

33. While Nielsen demographic data is not available for Wedding Central, the network's programming consisted of reruns from WE tv. The series that were rerun attracted a strongly adult and female-oriented audience when they aired on WE tv. Thus it is apparent that Wedding Central [REDACTED]

[REDACTED]. (See Appendix No. 2)

(2) Nielsen New York Market Ratings

34. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

32 [REDACTED]

33 CV-GSN 0277395.

34 *See, e.g.*, CV-GSN 0431685; CV-GSN 0431686.

35 *See e.g.*, CV-GSN 0431685; CV-GSN 0431686.

36 When ratings are based on the entire cable universe, the numerator (number of homes viewing) will be larger for the more widely distributed network simply because it is available in more homes. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

35. With these limitations in mind, I looked at the Nielsen ratings for GSN and its competitors in the New York market, which is Cablevision’s “home” market and where it repositioned GSN to a narrowly distributed tier. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

2010 Total Day: New York DMA³⁸

	<u>GSN</u>		<u>WE tv</u>	
	<u>Rtg</u>	<u>(00)</u>	<u>Rtg</u>	<u>(00)</u>
Households	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Women 18+	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

36. [REDACTED]

[REDACTED]

³⁷ [REDACTED]

³⁸ [REDACTED]

As described below, local ratings performance within individual demographic categories is not a key metric that either national cable networks or MVPDs would normally care about, even though Mr. Egan has focused his demographic analysis on such data. That said, in light of Mr. Egan’s emphasis on such data, I have reviewed GSN performance among women and in its key demographic categories in the New York DMA, and GSN performs well relative to WE tv. See [REDACTED]

[REDACTED]

[REDACTED]

2010 Total Day Households: Top Ten Markets³⁹

		GSN		WE	
		Rtg	(00)	Rtg	(00)
1	New York	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
2	Los Angeles	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
3	Chicago	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
4	Philadelphia	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
5	Dallas	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
6	San Francisco	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
7	Boston	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
8	Atlanta	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
9	Washington DC	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
10	Houston	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
10 Market Avg		[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

37. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

³⁹

[REDACTED]

See GSN Exh. 164.

38. In my experience, if an otherwise strong network is not competitive in a particular market, it may well be a matter of factors external to the strength or appeal of the network, such as poor channel positioning or inadequate marketing support by an MVPD. GSN [REDACTED] [REDACTED]. First, Cablevision carried WE tv on channel 42, near some of the top rated networks on cable (TNT, USA, TBS) and also near several [REDACTED] women's-oriented networks (Bravo, Lifetime).⁴⁰ This high-traffic neighborhood gave WE tv excellent exposure to potential women viewers. In contrast, GSN was placed on channel 88, in the midst of a cluster of premium movie channels which by their nature generate much less traffic (subscribers have to pay extra to view them) and are less compatible.⁴¹ [REDACTED]

[REDACTED]⁴² Indeed, [REDACTED]
[REDACTED]
[REDACTED]

⁴⁰ See GSN Exh. 180; See also GSN Exh. 90.

⁴¹ *Id.*

⁴² GSN Exh. 15 [REDACTED] ; GSN Exh. 16; GSN Exh. 18; CV-GSN 0046892
[REDACTED] GSN Exh. 165
[REDACTED] ;
see also GSN Exh. 152
[REDACTED] ; GSN Exh. 56
[REDACTED].

⁴³ GSN Exh. 17 [REDACTED]
[REDACTED]
(continued)

[REDACTED]

[REDACTED]⁴⁴ A second advantage enjoyed by WE tv was the presumably heavy promotion given it by Cablevision, which even had available to it local commercial spots on GSN itself. [REDACTED]

[REDACTED]

[REDACTED]⁴⁵ In contrast, GSN could presumably not buy local ad spots from Cablevision to insert in WE tv's programming feed. Likewise, whereas Cablevision was able to give its affiliated networks substantial promotion, it appears to have offered very little, if any, to GSN. It is my understanding that Cablevision has not conducted any significant promotion of GSN in recent years, notwithstanding the fact that other distributors have done so.⁴⁶ As noted above, [REDACTED]

[REDACTED]

[REDACTED].

(3) Effect on GSN Audience of Cablevision Repositioning in New York

39. It is possible to estimate from the New York audience data the approximate impact of Cablevision's downgrading of GSN from wide distribution to a narrowly distributed sports tier. Cablevision notified GSN in December 2010 that it

(continued)

GSN Exh. 16 [REDACTED]

⁴⁴ See GSN Exh. 24; *see also* GSN Exh. 70.

⁴⁵ See GSN Exh. 31 [REDACTED] GSN Exh. 189; GSN Exh. 190; GSN Exh. 191; GSN Exh. 192; GSN Exh. 193; GSN Exh. 188; GSN Exh. 187; GSN Exh. 184; GSN Exh. 186; GSN Exh. 185; CV-GSN 0432681.

⁴⁶ See GSN_CVC_00153928; GSN_CVC_00154474.

intended to reposition the network to its sports tier; however, it did not actually make this change until February 2011. Because Nielsen requires a period of time to reflect lineup changes in its records, the full effect of the repositioning was not evident until the second quarter of 2011. [REDACTED]

[REDACTED]⁴⁷ Homes still viewing after the move would be mostly subscribers to non-Cablevision distributors in the market (*e.g.*, Time-Warner).

Total Day Households: New York DMA⁴⁸

	Rtg	(00)
2Q 2010	[REDACTED]	[REDACTED]
2Q 2011	[REDACTED]	[REDACTED]
Change	[REDACTED]	[REDACTED]

40. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

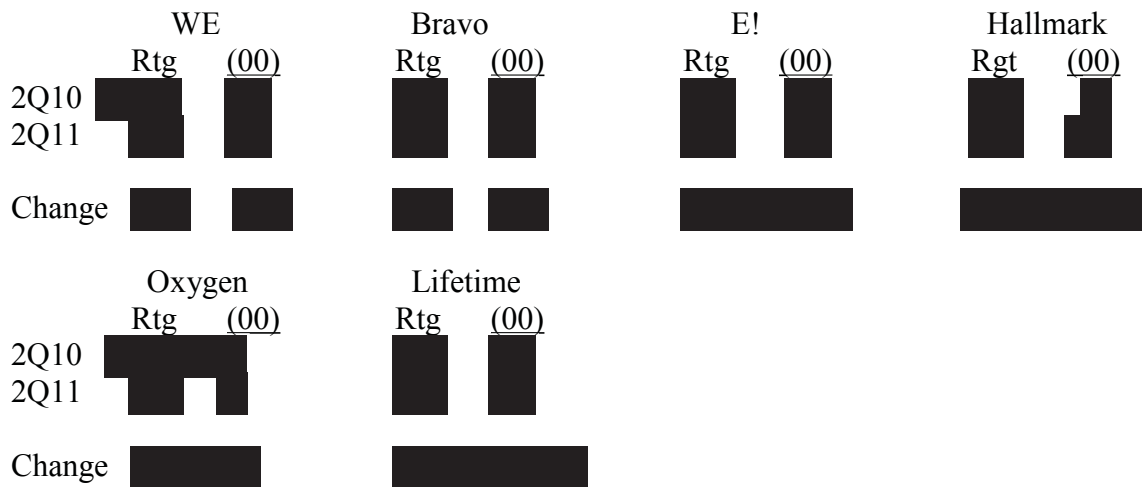
[REDACTED]

⁴⁷ Although GSN lost many viewers who were Cablevision subscribers following the retiering, Cablevision's set-top box data and records suggests that there were still fans trying to find GSN. *See, e.g.*, GSN Exh. 58 [REDACTED]

⁴⁸ [REDACTED]



Total Day Households: New York DMA⁵⁰



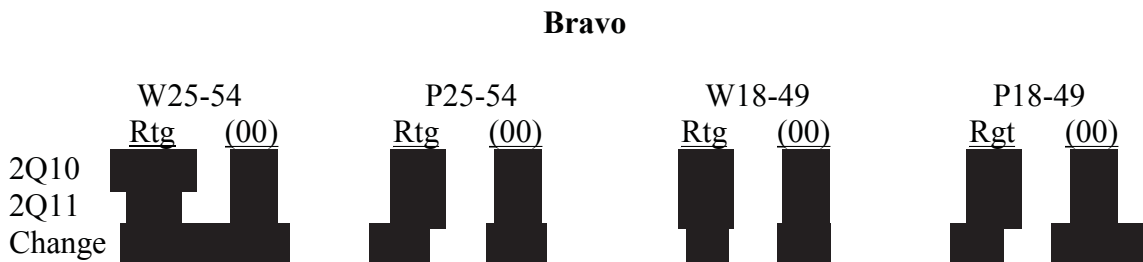
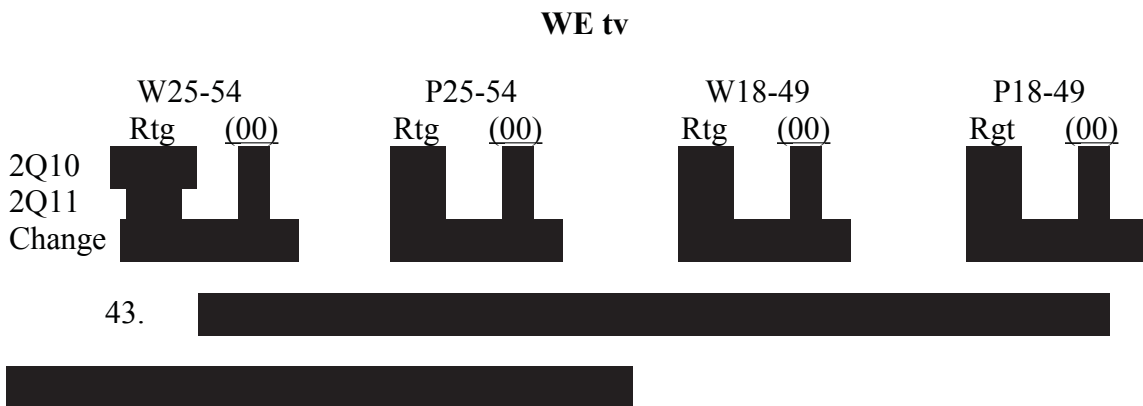
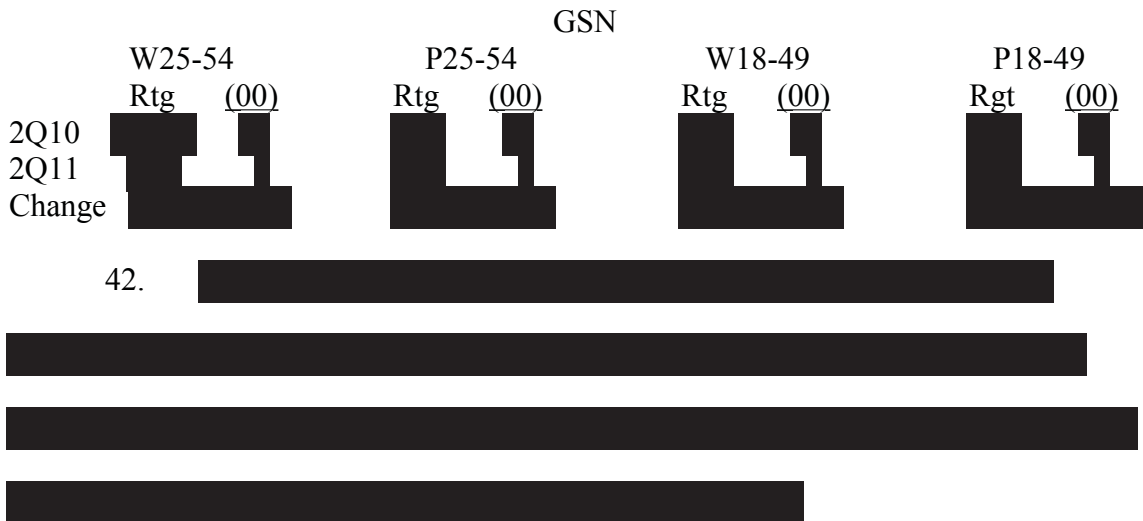
41. [Redacted]

[Redacted]

⁴⁹ Lifetime, the oldest of the women's networks, was launched in 1984 [Redacted]. Its strength was based on a combination of original dramas featuring empowered women and a steady diet of movies (original and off-network) showing women overcoming various perils. [Redacted]

⁵⁰ [Redacted]

Total Day Demographics: New York DMA⁵¹



⁵¹ *Id.*

E! Entertainment

	W25-54	P25-54	W18-49	P18-49
2Q10	Rtg (00)	Rtg (00)	Rtg (00)	Rgt (00)
2Q11				
Change				

Hallmark

	W25-54	P25-54	W18-49	P18-49
2Q10	Rtg (00)	Rtg (00)	Rtg (00)	Rgt (00)
2Q11				
Change				

Oxygen

	W25-54	P25-54	W18-49	P18-49
2Q10	Rtg (00)	Rtg (00)	Rtg (00)	Rgt (00)
2Q11				
Change				

Lifetime

	W25-54	P25-54	W18-49	P18-49
2Q10	Rtg (00)	Rtg (00)	Rtg (00)	Rgt (00)
2Q11				
Change				

44. [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Total Day Households: National Ratings⁵²

	<u>2Q10</u>	<u>2Q11</u>	<u>Change</u>
WE	[REDACTED]	[REDACTED]	[REDACTED]
Bravo	[REDACTED]	[REDACTED]	[REDACTED]
E!	[REDACTED]	[REDACTED]	[REDACTED]
Hallmark	[REDACTED]	[REDACTED]	[REDACTED]
Oxygen	[REDACTED]	[REDACTED]	[REDACTED]
Lifetime	[REDACTED]	[REDACTED]	[REDACTED]

45. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(4) Nielsen Ratings Within Cablevision Households

46. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵² [REDACTED]

⁵³ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

47. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

48. In my experience, a network's performance in individual demographic categories, such as women 18-49 or 25-54, would not be a key input for an MVPD making carriage decisions. That said, to evaluate the conclusions of Mr. Orszag and Mr. Egan, I also have examined how GSN and WE tv perform relative to each other in these key demographic categories in Cablevision's footprint, both nationally and within New York. The data show [REDACTED]

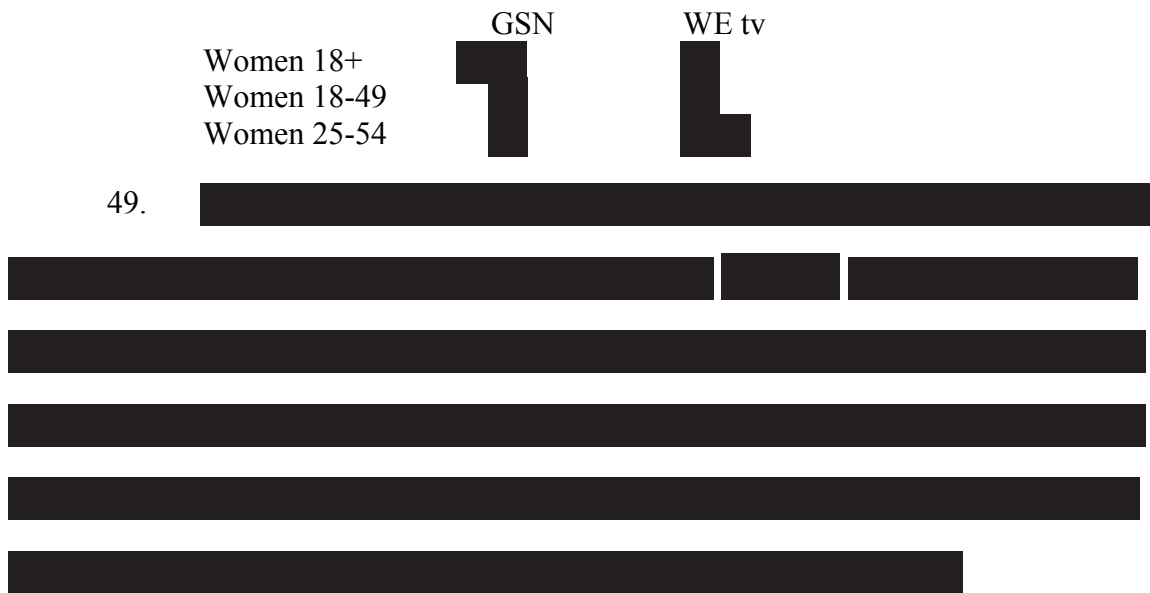
[REDACTED].

Total Day Ratings 2Q2010: Cablevision Households Nationwide⁵⁴

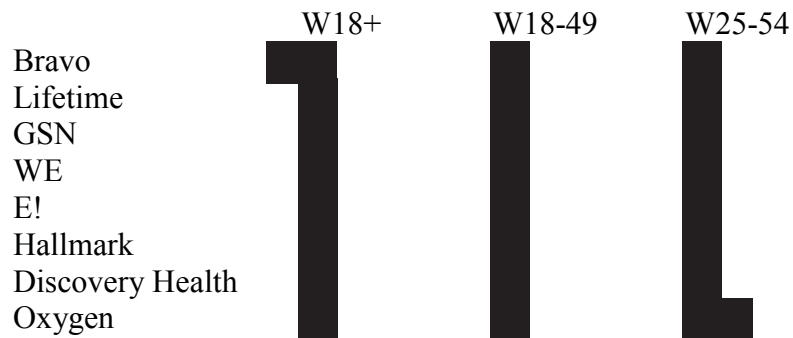


⁵⁴ [REDACTED]

Total Day Ratings 2Q2010: Cablevision Households in New York⁵⁵



**Total Day Ratings 2Q2010: Cablevision Households in New York⁵⁷
(ranked on women 18+)**



⁵⁵ [Redacted]

⁵⁶ OWN took over the distribution of Discovery Health at the beginning of 2011. [Redacted]

⁵⁷ [Redacted]

50. [REDACTED], and all of the foregoing data was readily available to it. The data, which is based on an independent, vetted and accredited source, stands in sharp contrast to Cablevision's unvetted, unaccredited set-top box data.

(5) Problems With Cablevision Proprietary Set-top Box Data

(a) General Problems with Set-top Box Data

51. Mr. Egan and Mr. Orszag each spend a considerable amount of time presenting selected data from an internal Cablevision set-top box ("STB") reporting system, which generates ABN ("Audience By Network") reports. Unlike Nielsen data, which is compiled under strict and publicly disclosed methodological standards (and accredited by the Media Ratings Counsel), this set top box data has not been shared with or vetted by anyone in the broader industry. As I pointed out in an earlier declaration, issued when Cablevision first cited such data, set-top box data does hold promise as part of a larger measurement system, but it is unreliable in its raw form due to a host of well-known methodological problems. Certainly, the reports and analyses that Mr. Orszag performs based on set-top box data are infected by these well-known methodological problems.

52. STB data is not accredited as a media measurement tool by the Media Rating Council (the "MRC"), and despite [REDACTED] it is not currently used as currency in buying or selling television time.⁵⁸ STB data has been widely discussed within the industry, and

⁵⁸ See CV-GSN 0430307, [REDACTED]
[REDACTED].

multiple problems with it have been identified and are well-understood by those in the industry. The following is a non-exclusive list of some of the serious issues that have been identified with the use of STB data for audience measurement purposes:

- a. There is no way that STB data can identify who—if anyone—in a household is watching. Cablevision consistently mischaracterizes this as “viewing” data, but in fact it reflects *set tuning*, not *persons viewing*. Among other things, this means that STB data cannot provide reliable information about viewer overlap since it cannot distinguish who within a household is watching which programs.
- b. Many STBs remain turned on even when the TV set is turned off, returning false readings of tuning.
- c. Most STBs cannot detect delayed viewing, especially if the DVR or VCR is an external unit.
- d. There is virtually no uniformity in terms of data obtained or processing rules.⁵⁹
- e. Different STBs—even those deployed by the same MVPD—may be configured differently, returning different types of data (or no data at all). Therefore, it has proven very difficult to aggregate data over a large footprint. Set-top boxes (including Cablevision’s) were not designed as audience measurement devices and retrofitting them to gather this data often proves problematic.
- f. STBs typically identify only the channel tuned, not the programming or program source, and are therefore subject to erroneous readings if a network is relocated to a different channel on any individual head-end or is part of a more complex feed pattern such as a “mosaic” channel.
- g. Information about whether an STB belongs to a residential or commercial entity is often unknown and unreported, and this can differentially affect networks. Also often unknown is important information about households, such as whether they are seasonal (*e.g.* a summer home).

⁵⁹ Processing rules are the rules by which raw data is accepted or discarded, and by which ratings and other metrics are calculated. Small changes in these rules can have a considerable and potentially differential effect on the reported performance of individual networks, and they are a primary focus of the auditors of the Media Rating Council when a measurement service applies for accreditation.

53. This is a non-exclusive list of several general problems that are inherent in the use of STB data. In addition to these general problems, there may be issues that raise questions about the reliability of a particular MVPD's STB data. Nielsen addresses these reliability problems in its sample-based measurement system. It has said that it is willing to incorporate STB data into its national measurement system, but ONLY once it meets the rigorous research standards required of reliable measurement and accreditation by the MRC.

54. I also have reviewed the [REDACTED]

[REDACTED] [REDACTED] [REDACTED]

[REDACTED]

[REDACTED]

55. Compounding the methodological concerns is the extreme secrecy with which Cablevision has historically shrouded this STB data, which raises the possibility of hidden biases in the data and the release of selective and potentially misleading results.⁶¹

⁶⁰ [REDACTED]

⁶¹ Cablevision has refused to share its data, or disclose its procedures for processing the data, with neutral associations of research professionals who wished to examine it, such as the Council for Research Excellence, even when offered Non-Disclosure Agreements. It has recently refused to work with the MRC to develop best practices for processing STB data, even though many other stakeholders in the industry (including other MVPDs) have done so. Its data has not been vetted by any third party, and is not (continued)

(With the Nielsen system, everything is available to all subscribers.) It was not possible for me to validate this data in the course of my examination based on a small subset of outputs produced from the system and limited information about the system; it generally takes the MRC auditors several years to do so.

56. These inherent reliability problems potentially are compounded by Cablevision's processing of the data. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

(continued)

accredited by the Media Rating Council (as are Nielsen and virtually all research services that are used as "currency" in the television industry). Note: In 2012 the MRC announced that it had been working with "a very large group of media industry stakeholders, including NCC Media, Multi-Channel Video Programming Distributors, data processing and measurement services as well as advertisers, agencies, and general media organizations to develop guidelines intended to foster greater consistency in collecting, accumulating and processing multi-channel digital video tuning data, otherwise often referred to as Set-Top-Box (STB) or Return-Path data." See Media Rating Council, "Multi-Channel Digital Video Data Capture, Accumulation and Processing Guidelines," http://mediaratingcouncil.org/stb_guidelines.htm. [REDACTED]. See GSN Exh. 212, at 107:13-22.

[REDACTED]

[REDACTED]

57. In summary, unvetted “black box” data is simply not accepted in the world of professional television research. I urge that its accuracy and the conclusions and analyses put forward by Mr. Egan and Mr. Orszag based on this data be viewed with strong skepticism here, at least until Cablevision is willing to submit its secret procedures to generally accepted third-party verification (*e.g.* the MRC). Until this is done, it cannot, in my opinion, be viewed as reliable in this case.

(b) **Problems with Set-top Box Reach Analysis**

58. In addition to inherent problems with the reliability of the STB data, a “reach” analysis along the lines of what Mr. Egan has presented in the context of this litigation is not a particularly useful measure of the popularity of a channel.⁶⁴ Household reach (or “cumulative households”) is the percentage of unique households that tuned to a given channel for a specified minimum number of minutes during a particular period of time. For example, if the minimum number of minutes is set at one minute, and the time span is one month, then reach would reflect the number of unique households that tuned to the channel for at least one minute during that month. Reach can vary widely depending on the parameters set. Accumulating reach over a very long period of time (*e.g.* a year, [REDACTED]) is virtually meaningless. If the

⁶³ For example, if a STB cannot adequately detect when the STB remains on but the set is turned off, then a network that people typically watch right before bedtime may get false credit for tuning late into the night or even all night long. [REDACTED]

⁶⁴ *Egan Decl.*, §V.B.2. ¶¶93-95.

period is long enough, and the bar set low enough, every channel is most likely tuned to at some point.

59. In addition, simply being positioned next to popular channels can drive up reach due to “drive-by tuning,” and in fact WE tv appears to have benefited from exactly that phenomenon due to its preferential channel placement. As noted previously, Cablevision carries WE tv on Channel 42, in the midst of a high traffic channel neighborhood that includes some of the [REDACTED] networks on cable (TNT, USA, TBS) and also near several [REDACTED] women’s oriented networks (Lifetime, Bravo). Despite this advantage, during a sample week for which Cablevision provided STB data during the discovery process, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

New
Analysis

⁶⁵ See infra note 67.

⁶⁶ *Id.*

⁶⁷ See GSN Exh. 152.

New
Analysis

Cablevision Set-Top Box Tuning Data: Cumulative Households⁶⁸

Channel No.	Network	Cumulative Households (Rank) Nov. 2009	Jan 2010 - Dec. 2010
37	TNT	[Redacted]	[Redacted]
38	USA	[Redacted]	[Redacted]
39	TBS	[Redacted]	[Redacted]
40	FX	[Redacted]	[Redacted]
41	Spike	[Redacted]	[Redacted]
42	WE tv	[Redacted]	[Redacted]
43	AMC	[Redacted]	[Redacted]
44	Bravo	[Redacted]	[Redacted]
45	Lifetime	[Redacted]	[Redacted]

Channel No.	Network	Cumulative Households (Rank) Nov. 2009	Jan 2010 - Dec. 2010
85	Cinemax	[Redacted]	[Redacted]
86	The Movie Channel	[Redacted]	[Redacted]
87	(empty)	[Redacted]	[Redacted]
88	GSN	[Redacted]	[Redacted]
89	(empty)	[Redacted]	[Redacted]
90	Showtime Too	[Redacted]	[Redacted]
91	Flix	[Redacted]	[Redacted]

For comparison purposes, [Redacted]

New
Analysis

60. Experienced researchers always evaluate data such as this in context. In

this case Cablevision's own data demonstrates that [Redacted]

New
Analysis

[Redacted]. Another factor that Cablevision

⁶⁸ GSN Exh. 45; GSN Exh. 158.

was able to use to advantage its own channels was the ability to “force-tune” set top boxes, so that, when the box was turned on, it automatically defaulted to a designated channel. [REDACTED]

[REDACTED]⁶⁹ Cablevision’s affiliated networks also had access directly to this data.⁷⁰ In my experience, these factors likely had a significant impact on GSN viewing within Cablevision’s footprint. Based on this

data, it is reasonable to assume that had GSN been given channel placement and marketing comparable to that of WE tv, it would have performed at least as well as the Cablevision-owned network, and possibly better.

61. In any event, quantity of tuning is potentially a more useful metric than cumulative households. [REDACTED]

[REDACTED]

[REDACTED]

⁶⁹ See GSN Exh. 146, [REDACTED];
[REDACTED];
see also GSN Exh. 37, [REDACTED];
[REDACTED] See GSN Exh. 212, at 116:10-117:15.

⁷⁰ See GSN Exh. 14; GSN Exh. 35; GSN Exh. 150.

Cablevision Set-Top Box Tuning Data: Week of November 2, 2009⁷¹

	Cumulative Households	Hours Tuned	Hours/ Household
GSN	[REDACTED]	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]	[REDACTED]
Wedding Central.	[REDACTED]	[REDACTED]	[REDACTED]

62. A similar relationship is seen in [REDACTED]

[REDACTED]⁷²

Cablevision Set-Top Box Tuning Data: January-December 2010⁷³

	Cumulative Households	Hours Tuned	Hours/ Household
GSN	[REDACTED]	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]	[REDACTED]
Wedding Central	[REDACTED]	[REDACTED]	[REDACTED]

63. [REDACTED]

[REDACTED] [REDACTED]

[REDACTED]

[REDACTED] [REDACTED]

[REDACTED] This is despite the fact that, in my experience, loyalty of viewers typically is an important consideration for MVPDs, whose number one goal is

⁷¹ See GSN Exh. 45 at CV-GSN 0006599.

⁷² [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] GSN Exh. 60.

⁷³ GSN Exh. 158.

⁷⁴ CV-GSN 0425003, [REDACTED]
[REDACTED].

⁷⁵ See GSN Exh. 167.

subscriber loyalty. [REDACTED]

[REDACTED]⁷⁶

64. Finally, it is worth noting that Cablevision seems to have been somewhat selective in its citation of STB data relevant to GSN. Mr. Orszag [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁶ As will be discussed later, Mr. Orszag (but not Mr. Egan) acknowledges the importance of loyalty to a network when an MVPD is considering the value to it of carrying that network. *See Orszag Report*, § IV ¶¶72-73. [REDACTED]

[REDACTED] *See* GSN Exh. 167, at CV-GSN 0288067. [REDACTED]

[REDACTED] *See* GSN Exh.

44.

⁷⁷

[REDACTED] *see also* GSN Exh. 66 [REDACTED]

[REDACTED] CV-GSN 0425006, [REDACTED]

⁷⁸

[REDACTED] GSN Exh. 212, at 25:20-

25.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Cablevision Set-Top Box Tuning Data⁷⁹

	Nov. 2009	Jan. 2010 - Dec. 2010	Feb-June 2010	June 2010	August 2010	Feb.- June 2010
Sample Used ⁸⁰	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
GSN	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
WE tv	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Wedding Central	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

(c) Problems With Set-top Box Duplication Analysis

65. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁷⁹ See GSN Exh. 45 at CV-GSN 0006599; GSN Exh. 63; GSN Exh. 68, at CV-GSN 0166815, CV-GSN 0166817; GSN Exh. 86; GSN Exh. 158. [REDACTED]

[REDACTED] GSN Exh. 60.

⁸⁰ Sometimes the reports identify the number of sample homes; other reports identify the number of sample homes that used televisions during the covered period.

⁸¹ [REDACTED]

Age Group	Percentage of Respondents
18-29	82%
30-49	80%
50-69	~75%
70+	~70%

66. [REDACTED]

Country	Percentage (%)
Russia	86%
Ukraine	79%
NATO	70%
United States	69%
Germany	59%
France	58%
China	57%
South Korea	56%
Japan	55%
India	54%
Brazil	53%
Mexico	52%
Australia	51%
Canada	50%
Italy	49%
Spain	48%
UK	47%
Turkey	46%
Saudi Arabia	45%
Israel	44%
Iran	43%
Pakistan	42%
Indonesia	41%
Philippines	40%
Vietnam	39%
Thailand	38%
Singapore	37%
Malaysia	36%
New Zealand	35%
Sweden	34%
Denmark	33%
Norway	32%
Finland	31%
Estonia	30%
Lithuania	29%
Latvia	28%
Czech Republic	27%
Slovakia	26%
Hungary	25%
Greece	24%
Poland	23%
Romania	22%
Bulgaria	21%
Slovenia	20%
Croatia	19%
Serbia	18%
Bosnia and Herzegovina	17%
Montenegro	16%
Kosovo	15%
Albania	14%
Moldova	13%
Georgia	12%
Armenia	11%
Azerbaijan	10%
Netherlands	9%
Ireland	8%
Belgium	7%
Portugal	6%
Greece	5%
Cyprus	4%
Malta	3%
Chad	2%
Niger	1%
Mali	0%

67. [REDACTED]

83

[REDACTED]

[REDACTED] 84

68. There are also other methodological problems with Mr. Orszag's analyses.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

C. Viewer Attitudes Toward GSN and WE tv

69. Viewer satisfaction with networks is another key measure that, in my experience, is considered by distributors since it reflects subscribers' presumed willingness to remain subscribers and potentially buy enhanced services.

[REDACTED]⁸⁵ One dramatic indication of Cablevision subscriber attitudes toward GSN is found in subscriber reaction when it was removed from wide availability. [REDACTED]

[REDACTED]

[REDACTED]⁸⁶ In addition, virtually all distributors conduct private surveys measuring subscriber satisfaction. I requested and was provided with the best known and most widely used impartial, third-party survey of cable subscriber satisfaction, which is conducted annually by the Beta Research Corp. The Beta Basic Cable Subscriber Study has been used throughout the industry for many years as an impartial "benchmark" on viewer attitudes.⁸⁷

⁸⁵ See GSN Exh. 207, at 25:23-26:14; GSN Exh. 167, at CV-GSN 0288067.

⁸⁶ CV-GSN 0298226-27, [REDACTED]

⁸⁷ I was involved in carriage negotiations with MVPDs (from the network side) for nearly twenty years. In those negotiations, MVPDs sometimes dismissed the value of impartial, third-party data (including Nielsen and Beta Research) that a network might bring to the table. This is a negotiating tactic. I strongly suggest considering what MVPDs do, not what they say, when it comes to judging what they consider important in carriage decisions. Networks that do well in Beta are almost always given carriage, irrespective of other factors. Examples are [REDACTED] and [REDACTED], which historically ranked higher in Beta "liking" scores than in ratings, and are relatively expensive, but based on my experience in the industry are considered "must carries" because of intense viewer interest.

88

	<u>2010</u>	<u>2009</u>	<u>2008</u>	<u>3 Yr Avg</u>
Perceived Value of Network ($\pm \$0.15$)				
GSN				
WE				
Average Satisfaction Score on 1-5 Scale				
GSN				
WE				

89

Very Satisfied with Network ($\pm 5\%$)



Network Programming Quality Is High ($\pm 5\%$)

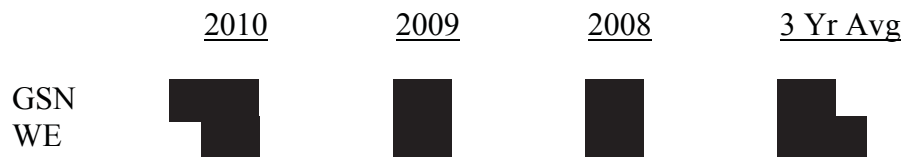


Network is Important to Enjoyment of Cable ($\pm 5\%$)



71. Beta also includes reported viewing over the past 12 months, and GSN and WE tv [REDACTED].

Beta: Viewed Network in Last 12 Months ($\pm 3\%$)⁹⁰



72. I also looked at a separate Beta Brand Identity Study in which respondents indicate how well they believe various adjectives describe a network. [REDACTED]

[REDACTED] The data is contained in Appendix No. 1.

73. Finally, I also examined attitudinal data provided by the widely used MRI service to compare the audiences of GSN and WE tv. The [REDACTED]

[REDACTED]

[REDACTED]⁹¹.

⁹⁰ *Id.*

⁹¹ *See Appendix no. 3.*

D. Target Audience

74. One element suggested in FCC guidelines for determining network similarity is “target audience.” In my experience the target audience of a network is best defined by the demographic orientation of the programming it purchases and airs, and the audience that is attracted to that programming. Here, it is clear that [REDACTED]

[REDACTED]. Game shows and wedding shows both appeal primarily to women.

75. I have reviewed Mr. Egan’s “look and feel” evaluation of the networks in this case, but I do not find it credible. While it might be appropriate to rely on subjective assessments of target audience for networks that do not receive ratings sufficient to measure viewing, there is no need to rely on subjective and impressionistic judgments where independent, quantitative measures of audience exist. To cite one example of why slogans and promotional verbiage may not be the best way to judge the “target” of a network, Lifetime Television is the iconic women’s network and for many years, it used the slogan “television for women.” It dropped that slogan in 2005 in favor of the tagline “Connect. Play. Share.” Does this mean that it no longer targeted women, because the tagline no longer explicitly said so? Because it did not refer to another demographic such as men or children, does that mean it did not “target” them either? No. Lifetime continued to make programming and other decisions with the goal of attracting women viewers. The absence of an express reference to a target demographic has questionable value when used as evidence that Lifetime does not target the female demographic, especially in light of overwhelming objective evidence that women comprise Lifetime’s

target audience. (I was the head of research for Lifetime during this period, and our research efforts were focused exclusively on women.) Even though WE tv was focused on building its women audience, [REDACTED]

[REDACTED]⁹²

76. Similarly, the fact that GSN schedules a type of programming that appeals predominantly to women, attracts a predominantly ([REDACTED]) female audience, and sells women demographics to advertisers—and has done so for its entire history—in itself provides sufficient evidence that it “targets” the women’s audience.⁹³

77. While these are the key factors and themselves sufficient in evaluating whether GSN “targets” a women’s audience, it is worth noting that GSN’s performance with women is consistent with the widespread understanding in the industry that game shows are generally targeted at women. During the 1960s, ‘70s and ‘80s, game shows were mainstays of the broadcast network daytime lineups, a female-oriented daypart.⁹⁴ During the 1990s the Lifetime cable network (“Television for Women”), as well as USA Network, carried daytime blocks of game shows.⁹⁵ I was in charge of testing game

⁹² GSN Exh. 42.

⁹³ While these objective criteria provide sufficient evidence that GSN targets a women’s audience, it is clear [REDACTED].
See GSN Exh. 108 [REDACTED]. See GSN Exh. [REDACTED].

[REDACTED]. And GSN’s marquee relationship-themed shows, such as *Baggage*, have attracted attention and audience from young women viewers. See GSN Exh. 171; GSN Exh. 170.

⁹⁴ David Schwartz, Steve Ryan, and Fred Wostbrock, *The Encyclopedia of TV Game Shows* 549-563 (1987); David Schwartz, Steve Ryan, and Fred Wostbrock, *The Encyclopedia of TV Game Shows* xx-xxv (Facts on File, 2d ed. 1995) (1987).

⁹⁵ I worked at both of these networks and personally analyzed these schedules.

shows for NBC in the 1980s and for USA Network in the 1990s, and our target audience was always women. I supervised hundreds of focus groups, dial tests, and surveys during that period and our game show studies focused on women. This is because our goal was to strengthen the appeal of such shows among women audiences. Game show producers often cast couples, relatives or even whole families as contestants and/or featured female-oriented prizes, such as household goods, because they perceived that those elements would appeal to women. The notion that game shows cater primarily to women also is noted in the literature.⁹⁶

New
Analysis

78. To quantify the degree to which quiz shows appeal to women, I requested a tabulation of the Nielsen demographic ratings for broadcast network or syndicated programs coded by Nielsen as “quiz-giveaway” or “quiz-panel” during 2010. Nine such programs were identified, all of which skewed female. [REDACTED]

[REDACTED]⁹⁷

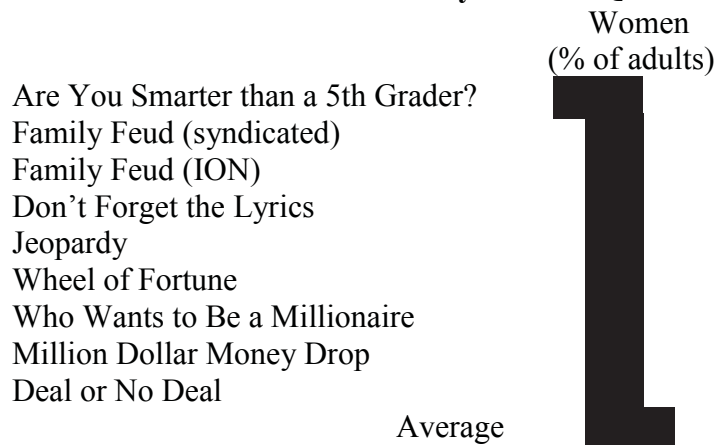
⁹⁶ Edd Applegate, *Journalism in the United States: Concepts and Issues* 90 (2011) (“This is certainly one reason for there being so many programs that cater to women. During the day, for instance, networks broadcast network- or syndicate-created or -packaged game shows, talk shows, and soap operas”). Anne Cooper-Chenn, *Games in the Global Village: A 50-Nation Study of Entertainment Television* 18 (1994) (“Game Shows (mind sports) function for female viewers in much the same way that TV athletic contests function for males”). Morris B. Holbrook, *Daytime Television Game Shows and the Celebration of Merchandise: The Price Is Right* 84 (1993) (“The target audience for the audience on daytime soaps and game shows is assumed to consist largely of women”).

⁹⁷ According to another source, the industry reference book *TV Dimensions*, the adult audience for daytime TV game shows averages 67% female, and for syndicated early fringe game shows, 60% female. *TV Dimensions* 281 (2005). The percentages were the same in the edition published in 2000 (page 264), an era from which GSN draws much of its daytime schedule.

New
Analysis

Broadcast Network and Syndicated Quiz Shows (2010)⁹⁸

New
Analysis



E. Program Genres on GSN and WE tv

79. The subject of program genres is complex, and often misunderstood. I have had an unusual amount of experience analyzing and categorizing television programming, both as part of my employment at several networks and, beginning in 1979, with the publication of my book *The Complete Directory to Prime Time Network and Cable TV Shows*. This book is extensively used by the industry and by the public (it is now in its ninth edition, with more than 500,000 copies in print), and it is widely acknowledged as the leading resource of its type.⁹⁹ Over the past 33 years my co-author and I have classified more than 6,500 series described in this book, and as a result we have had to develop an appropriate categorization schema that was understood and accepted by the industry and the public at large. The following comments are informed by this extensive experience.

New
Analysis

⁹⁸

⁹⁹

Brooks & Marsh.

80. Although sometimes useful for classification purposes, genre labels are not widely used as a decision metric in the television industry. Moreover, almost all genres overlap with other genres. “Science fiction” and “adventure” programming are closely related, as I learned while conducting research for the Sci-Fi Channel.¹⁰⁰ Comedies often include dramatic elements, and vice versa, leading to hybrid forms such as “dramedies.” Further, some genre labels are less precise than others. This often depends on how long they have existed. For example, some long-established genres such as “situation comedy” and “sports” are relatively well defined, however “reality” is a recent label that has been applied to, and overlaps with, a multitude of programming types. Unlike more well-established labels, it is not a distinct “genre” of programming, and is probably the least well-defined label in television. Significantly, the types of programming with which it overlaps include similarly unscripted game shows and dating shows, both staples of GSN.

81. The term “reality show” was rarely used by either the industry or the public before the year 2000, when the press adopted it to describe the breakout series *Survivor*, *Big Brother*, and others. Indeed, the vanguard of this new wave of programming was the quiz show *Who Wants to Be A Millionaire* in the late summer of 1999, which reminded networks of the value of audience participation (anyone could get on the show by calling in and taking some tests) and of showing ordinary people on the screen.¹⁰¹ During the next few years, unscripted reality programs were closely

¹⁰⁰ Indeed, some of our test subjects affirmatively rejected “science fiction,” but then embraced genre films such as *Star Wars* and *ET*, calling them simply “good movies.”

¹⁰¹ Brooks & Marsh, at xx.

intermixed on the prime time schedule with game shows (almost exclusively, unscripted) like *Greed*, *Twenty-One*, *The Weakest Link*, and *Elimidate*. Since that time, “reality” has been applied, inconsistently, to an extremely wide range of programming having little in common other than that the programs in some sense reflect “real life” and/or involve “real people.”

82. Faced with this inconsistency, in *The Complete Directory* we found it necessary to qualify the term, when used at all, by the better understood program type to which it is attached, e.g. “Reality/Competition,” “Romance/Reality,” “Reality/Adventure,” etc. “Reality” was rarely used alone used to describe a program.

83. Several other books also comment on the vagueness of the term “reality.” *The Encyclopedia of TV* (1997), cited by Mr. Egan, begins its entry on reality programming by emphasizing that “Reality programming is an expansive television industry label,” and that “the corpus of programs grouped under this generic rubric is admittedly varied.” Later it adds that “‘the real’ in reality programming is a highly flexible concept.”¹⁰² The updated 2004 edition of the same publication is even more specific, calling Reality Television “a label that encompasses a wide range of nonfiction formats”, including both “gamedocs” and “dating shows.”¹⁰³ Similarly, *Media Programming: Strategies and Practices* (2009) emphasizes that programs sometimes referred to as reality programming are in fact closely intertwined with other genres.

¹⁰² Beth Seaton, “Reality Programming,” The Museum of Broadcast Communications, <http://www.museum.tv/eotvsection.php?entrycode=realtyprogr> (accessed Dec. 18, 2011). I am using here the URL provided by Mr. Egan (*Egan Decl.*, §IV.A. ¶13 n.9), although I note that the entries found there seem to have been written in the 1990s and thus have marginal relevance to the present discussion.

¹⁰³ *Encyclopedia of Television* 1900 (Horace Newcomb ed., 2004).

Similar to my *Complete Directory*, it explains that by the turn of this century so-called reality shows “had resurfaced on a wave of game shows (*Who Wants to Be a Millionaire?*), which was soon overtaken by other types of reality programs (*Dancing with the Stars* and *American Idol*) and one more hit game show (*Deal or No Deal*).”¹⁰⁴ In early 2012, GSN began airing *Dancing with the Stars*.

84. The public also appears to consider “game shows” and “reality shows” closely related. Citing various books and MSNBC among other sources, the Wikipedia entry for “Reality Television” bluntly states up front that “The [Reality] genre covers a wide range of television programming formats, from game show or quiz shows . . . to surveillance- or voyeurism-focused productions such as *Big Brother*.”¹⁰⁵ Later it states that “Modern game shows like *Weakest Link*, *Greed*, *Who Wants to Be a Millionaire?*, *American Gladiators*, *Dog Eat Dog* and *Deal or No Deal* also lie in a gray area...these factors, as well as these shows’ rise in global popularity at the same time as the arrival of the reality craze, lead many people to group them under the reality TV umbrella as well as the traditional game show one.” Similarly, it describes “Dating Shows” including *The Dating Game*, *Blind Date*, *Matchmaker*, *Room Raiders*, *Elimidate*, *Next* and *Parental Control* under reality television. Note that several of the specific shows cited (*The Dating Game*, *Deal or No Deal*, *Dog Eat Dog*, *Greed*, *Weakest Link*, *Who Wants to Be a Millionaire?*) are either running now or have run on GSN.

¹⁰⁴ Susan Tyler Eastman and Douglas A. Ferguson, *Media Programming: Strategies and Practices* 6 (2009).

¹⁰⁵ Wikipedia, “Reality Television,” http://en.wikipedia.org/wiki/Reality_television (accessed Dec. 17, 2011).

85. Perhaps the most glaring example of the vagueness of this “genre” comes from WE tv itself. Every network that subscribes to the Nielsen rating service is required to regularly submit its program schedule and to categorize each of the programs therein

[REDACTED].¹⁰⁶ One of the category options provided in Nielsen’s standard list is [REDACTED]

[REDACTED]
[REDACTED] [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

86. Program genre can indeed be a useful point of differentiation when comparing networks with well-defined types of programming or programming types that clearly appeal to different audiences. (Although, even then, genre is not widely used as a decision metric within the industry.) However in this case, with a term as fuzzy and ill-defined as “reality,” genre is not as persuasive as audience measurement data in establishing whether networks compete for viewers. More important, in my experience, is whether viewers find the programs on two networks to be sufficiently similar (or

106 [REDACTED]

107 [REDACTED]

related) that they are attracted to both networks, which is the case with GSN and WE tv, and whether two networks in fact appeal to the same demographics, which is also the case with GSN, WE tv, and Wedding Central. By the excessive use of artificial, self-defined labels Cablevision obscures the fact that game shows as a class, both today and historically, have always appealed predominantly to women, as has the programming on WE tv (whatever one wishes to call it).¹⁰⁸

F. Implications

87. In summary, based on my experience and on a thorough examination of the forgoing data, I believe that GSN and WE tv would be considered similar by MVPDs, by advertisers, and by viewers. For MVPDs, key factors to consider (besides price) are audience size and loyalty. On a national total audience basis [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

¹⁰⁸ Some of Mr. Egan's statements regarding game shows simply do not make sense. He makes the unsupported assertion that "virtually all of the game show programs on GSN will typically be of interest to either men or women." (*Egan Decl.*, §IV.B.1. ¶31) [REDACTED]

And later in the same paragraph he retreats from gender characterization, saying that game shows appeal to those with an "interest in game shows," which is circular logic.



2010 Total Day Ratings

	GSN	WE
National Ratings ¹⁰⁹		
Households		
Women 18+		
Persons 2+		
New York DMA Ratings ¹¹⁰		
Households		
Women 18+		
Persons 2+		

88. GSN and WE tv are [REDACTED]. First, it is important to keep in mind the limitations of STB data, of which Cablevision executives should have been aware. Nielsen data represents actual viewing, not household tuning, and is based on a representative sample and on accepted calculation procedures that have been audited, accredited, and accepted by the industry at large. The set-top box data produced by Cablevision reflects only household tuning, is unaudited, unaccredited, not accepted as currency in the marketplace, and was only selectively revealed even in the context of this proceeding. For a host of reasons it is far less reliable than Nielsen data, which was readily available to Cablevision [REDACTED]. Even if one puts aside concerns about the reliability of set-top box data, however, that data shows GSN to be a much

¹⁰⁹ [REDACTED]

¹¹⁰ [REDACTED]

stronger performer on Cablevision systems than Cablevision asserts. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED] Furthermore, WE tv benefited from being placed near to some [REDACTED] female-oriented networks on cable, while GSN was surrounded by premium movie networks with which it shared little in common. Another important factor, which Cablevision researchers pointed out to Cablevision management, is the loyalty of GSN viewers; [REDACTED]

[REDACTED]
This is a measure of subscriber satisfaction that MVPDs typically find important. When all of these factors are taken into consideration it is clear that GSN and WE tv [REDACTED]

[REDACTED]
[REDACTED]. Viewer loyalty is typically of high concern to MVPDs. [REDACTED]

89. For advertisers, the key metrics defining similarity are demographics.



Total Day Ratings: Women 25-54 (2Q2010)



91. From the perspective of viewers, GSN and WE tv air programs of similar appeal. GSN primarily airs game show programs, expansively defined. WE tv claims it focuses on “reality programming,” but that term is so vague and ill-defined that even

[Redacted]

¹¹¹ [Redacted]

¹¹² [Redacted]

Whatever it chooses to call its shows, there is clearly a great deal of overlap in basic elements of appeal with much of the programming on GSN (real people, relationships, romantic entanglements, celebrities, etc.). That, in my opinion, is why there is [REDACTED]

[REDACTED].

92. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

93. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

94. Based on all of the data examined, assuming they had comparable distribution GSN and WE tv should at a minimum be able to attract comparable audiences, provide comparable audience satisfaction, and generate comparable sales revenue. [REDACTED]

[REDACTED] However, with respect to Cablevision this is not currently the case.

IV. HARM DONE

95. Based on my analysis and my experience in the industry, I believe that Cablevision has significantly harmed GSN by repositioning it from wide distribution on its New York systems to a little-seen, extra-cost sports tier, and, in my experience, these

harms will become even more material over time. Extra-cost tiers are considered the “Siberia” of cable. Uptake is generally low; in the case of Cablevision the tier in question appears to reach [REDACTED], versus the [REDACTED] that GSN reached previously via basic distribution.¹¹³ [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]¹¹⁴ Here, there was a nearly [REDACTED]
[REDACTED]. Further, networks do not want to be perceived by others in the cable ecosystem, including cable and satellite operators, advertisers, and the press, as a “tiered” network. Being perceived as a “basic network” (versus a “tiered” network) is important to the long-term distribution strategies of most networks. [REDACTED]

[REDACTED]
[REDACTED]¹¹⁵ Likewise, networks that are viewed as “tiered” rather than “basic” are not favored by advertisers.

96. In addition, positioning on a tier reduces or eliminates the opportunity for a network to benefit from casual viewers (or “surfers”). This is an important means by which networks gain viewers, by attracting viewers who happen upon the network or who tune to it for a special event or premiere. The network can then attempt to convert them

¹¹³ [REDACTED]

¹¹⁴ GSN Exh. 165.

¹¹⁵ GSN Exh. 10; *see also* GSN Exh. 9 [REDACTED]
[REDACTED]

to more regular viewership by that programming and/or by promotional advertisements for other shows. It is almost impossible for a network to attract new viewers in this manner on a limited-distribution extra-cost tier.

97. The Cablevision downgrade is particularly harmful because of the wholly inappropriate nature of the “Sports & Entertainment Pak” tier on which it was placed. All of the other networks on the tier are sports and/or male oriented. They include major league baseball, hockey, horse racing, golf, basketball, soccer, and wrestling channels. This will virtually guarantee that those few subscribers who buy this tier will be males looking for additional sports programming.¹¹⁶ The full list of channels with which GSN is now placed is as follows:

Networks on Cablevision’s iO Sports & Entertainment Pak¹¹⁷

GSN
 ESPN Classic (reruns)
 ESPNU (college sports)
 NFL Network
 NFL Redzone
 ESPN Goal Line/ESPN Buzzer Beater (college sports)
 MLB Network
 NHL Network
 TVG Network (horseracing)
 Fuel TV (extreme sports)
 FCS Pacific (college sports)
 FCS Central (college sports)
 FCS Atlantic (college sports)
 Outdoor Channel
 NBC Sports Network

¹¹⁶ MVPDs sometimes assert that they want to put a popular channel on a tier in order to drive viewers to that tier. However this only works if the popular channel so placed is appropriate to the tier; for example placing ESPN in the “Sports & Entertainment Pak” might drive subscribership to the tier. Notwithstanding GSN’s strength as a network, placing GSN amid channels with which it has nothing in common will not accomplish that goal.

¹¹⁷ GSN Exh. 178.

Versus (now NBC Sports Network)
 Gol TV (soccer)
 The Golf Channel
 MavTV (“covers all the hot-button topics guys care about”)
 Big Ten Network (college sports)
 NBA TV
 Fox Soccer Plus
 Sportsman Channel
 Neo Cricket
 Fight Now TV (wrestling, mixed martial arts, boxing)
 World Fishing Network

98. In the New York market the effect of the GSN downgrade has been dramatic, with declines of about [REDACTED] in households tuned and [REDACTED] in GSN’s principal demographics. This is only part of the story, however. Simultaneously,

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] In other words, Cablevision appears to have benefited its own WE tv network by removing a competitor from wide availability on its lineup.

99. In 2010 Cablevision’s New York systems accounted for approximately [REDACTED] GSN homes. The repositioning will obviously have a negative impact on the audience GSN has to sell to national advertisers. To the extent that revenue is lost, it is likely to impact the ability of the network to develop and market programming.

[REDACTED]

[REDACTED]¹¹⁸ Of course, GSN's viewership decreased by [REDACTED] as a result of the retiering. In my experience, the first two areas that are cut when revenue is soft are marketing and program development.

100. Additionally, based on my experience the impact may be greater than simply the number of viewers lost. New York is the media capital of the U.S., the home base of many of the top advertising agencies and buying groups. For example, [REDACTED]

[REDACTED]¹¹⁹ Distribution in New York and its suburbs (where many executives live) is considered in the industry to be important for a network to remain familiar to and front-of-mind among those making buying decisions.¹²⁰ It appears that [REDACTED]

[REDACTED]¹²¹ Accordingly, GSN's

¹¹⁸ See GSN Exh. 152.

¹¹⁹ GSN Exh. 140.

¹²⁰ [REDACTED]
[REDACTED] See GSN Exh. 70, at CV-GSN 0269427.

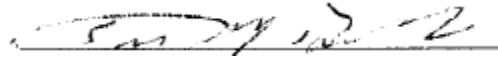
¹²¹ GSN Exh. 24; *see also* GSN Exh. 52 [REDACTED]
[REDACTED].

being effectively “blacked out” in a large portion of New York homes is likely to have a disproportionate effect on GSN’s national viability as an advertising medium.¹²²

¹²² [REDACTED]

GSN Exh. 24.

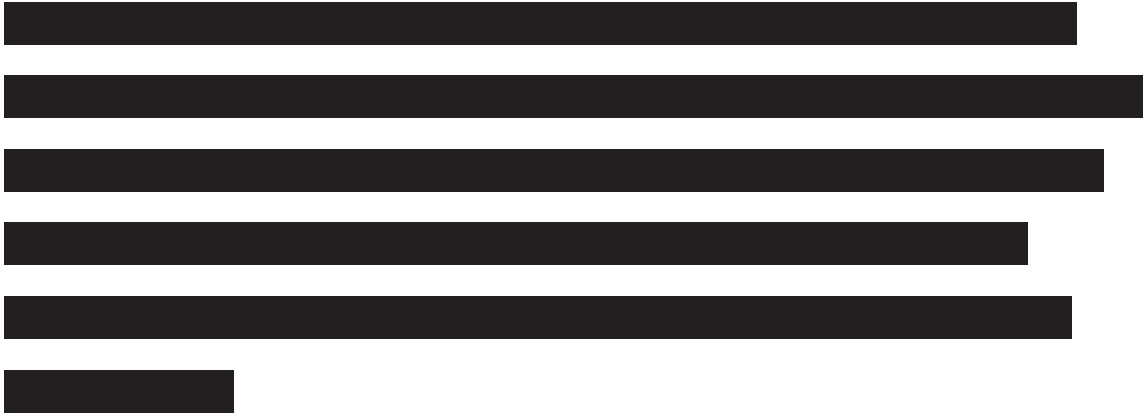
I declare under penalty of perjury that, to the best of my knowledge and belief, the foregoing is true and correct. Executed on March 12, 2013.

A handwritten signature in black ink, appearing to read "Timothy Brooks", written over a horizontal line.

TIMOTHY BROOKS

Appendix #1

Beta issues a Brand Identity Study in which respondents indicate how well they believe various adjectives describe each network. This provides another impartial measure of how enthusiastic viewers are about a network. [REDACTED]



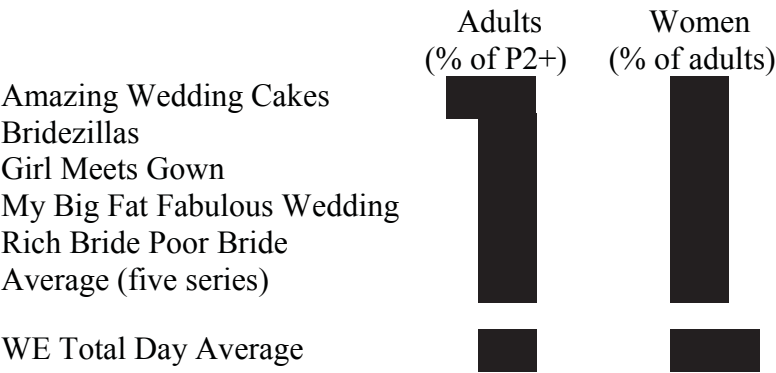
Beta Viewer Network Descriptors: 2009-2011¹²³ (Among viewers of each network; very much describes network)

	<u>GSN</u>	<u>WE</u>
One of My Favorites	[REDACTED]	[REDACTED]
Distinctive	[REDACTED]	[REDACTED]
Entertaining	[REDACTED]	[REDACTED]
Fun	[REDACTED]	[REDACTED]
Family Oriented	[REDACTED]	[REDACTED]
Has Hosts/Personalities I Like	[REDACTED]	[REDACTED]
Informative	[REDACTED]	[REDACTED]
Bold, Tries New Things	[REDACTED]	[REDACTED]
High Quality	[REDACTED]	[REDACTED]
Has Many Original Programs	[REDACTED]	[REDACTED]
Valuable	[REDACTED]	[REDACTED]
Inclined to Pay Attention	[REDACTED]	[REDACTED]
to Commercials on This Network	[REDACTED]	[REDACTED]
More Likely to Buy Product Advertised	[REDACTED]	[REDACTED]
on This Network	[REDACTED]	[REDACTED]

¹²³ [REDACTED]

Appendix #2

Wedding Central Programs
(Audience composition when these series aired on WE)¹²⁴

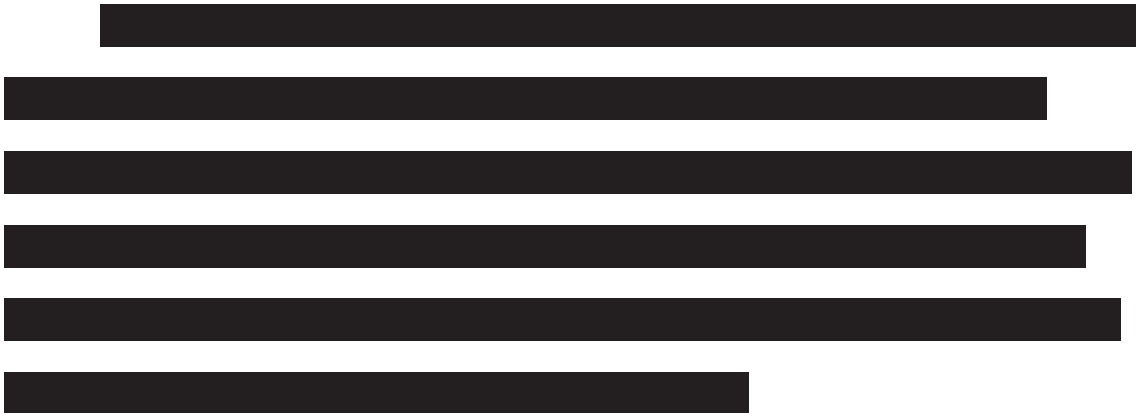


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Appendix #3

MRI Attitudinal Data

The following data is read as follows. “Vert%” indicates the percent of each network’s viewers who agree with the statement. “Index” indicates how much this score is above (or below) the same score for all respondents. Thus for the first statement (“people ask me for advice”), [REDACTED] indicates that GSN viewers are [REDACTED] above average, and [REDACTED] indicates that WE tv viewers are [REDACTED] above average on this measure.



2010 MRI Attitudinal Data¹²⁵

		All	GSN	WE tv
Black	100%	100%	100%	100%
Hispanic	100%	100%	100%	100%
White	100%	100%	100%	100%
Asian	100%	100%	100%	100%
Other	100%	100%	100%	100%
Gay, lesbian, or transgender	100%	100%	100%	100%
Married	100%	100%	100%	100%
Single	100%	100%	100%	100%
Divorced	100%	100%	100%	100%
Widowed	100%	100%	100%	100%
With children	100%	100%	100%	100%
Without children	100%	100%	100%	100%
With a pet	100%	100%	100%	100%
Without a pet	100%	100%	100%	100%
With a car	100%	100%	100%	100%
Without a car	100%	100%	100%	100%
With a job	100%	100%	100%	100%
Without a job	100%	100%	100%	100%
With a home	100%	100%	100%	100%
Without a home	100%	100%	100%	100%
With a car	100%	100%	100%	100%
Without a car	100%	100%	100%	100%
With a job	100%	100%	100%	100%
Without a job	100%	100%	100%	100%
With a home	100%	100%	100%	100%
Without a home	100%	100%	100%	100%

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Appendix #4

WE tv Assigned Program Categories
(Programs coded Reality by Egan and also coded by WE for Nielsen)

Program	WE: Nielsen Summary Code	WE: Nielsen Detail Type Code	Egan
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]

Appendix 5: CURRICULUM VITAE

TIM BROOKS
27 Greenway Drive
Greenwich, CT 06831
203-531-1842
tim@timbrooks.net
www.timbrooks.net

Consultant, former television industry executive and award-winning author specializing in media research and the history of television and other media.

Professional Experience

Independent Consultant

2008 -

- Engaged by a variety of private-sector firms and industry groups to advise them on media research-related matters.

Lifetime Entertainment Services

2000 - 2007

Executive Vice President, Research
Senior Vice President, Research

- Member of senior management team, reporting to President/CEO. Headed research department, worked closely with programming, advertising sales, marketing, affiliate relations, finance, digital, corporate communications and other departments on current operations and new ventures. Lifetime became the number one rated cable network during this period.
- Participated in launch and distribution of Lifetime Real Women and relaunch of Lifetime Movie Network; launch of *Lifetime Magazine*; relaunch of successful women's internet site.

USA Networks

1991 - 1999

Senior Vice President, Research
Vice President, Research

- Member of senior management team, reporting to President/CEO. Headed research department. Worked closely with all other departments on current operations and new ventures. Negotiated numerous supplier contracts, coordinated company-wide research contracts involving multiple divisions of USA Networks.
- Member of the three-person team that structured the programming and business plan for the highly successful Sci-Fi Channel (1992).
- Intimately involved in the launch and distribution of USA's Latin American and European networks in 1994 and 1995; conducted consumer research in nine countries in Europe, Latin America and Asia.

NW Ayer

1989 - 1990

Senior Vice President/Media Research Director

- Headed research department.
- Member of core team that pitched and won the 1992 Olympics account for Ayer.
- Helped develop multi-media advertising plans, evaluated media plans of networks.

NBC-TV Network

1977 - 1988

Director, Program and Advertising Research

Director, Television Network Research

Manager, Audience Measurement Analysis

- Middle manager and later senior manager in the NBC-TV research department, initially responsible for evaluating scheduling plans and estimating ratings for both programming and sales. Later advanced to director of East Coast program testing, primarily responsible for consumer testing of daytime programming, made-for-TV movies and promotional campaigns.

Television Advertising Representatives, Inc. (Group W)

1976 - 1977

Assistant Director, Research & Marketing

Prior Positions

1970 - 1976

Manager, Daytime/Nighttime Research, NBC-TV

Research Analyst, NBC Stations Division

Sales Research Analyst, WCBS-TV

Co-Founder, TV spot production company (while at Syracuse University)

Industry Leadership

Council for Research Excellence

- Founding member of this consortium of major media companies, agencies and advertisers; board of directors (2005-2007); member of the Media Consumption and Engagement Committee (2005 to date) which fielded a groundbreaking observational study of video consumer behavior in the new media environment.
- Also worked with the Set-Top Box Committee on an investigation of activities in that emerging field.

Advertising Research Foundation (ARF)

- Chairman of the Board (1998-1999), board of directors (1995-2000), chairman of Video Electronic Media Council (1995-2007).
- Promoted learning and dialogue between buyer and seller segments of the industry at numerous well-attended events I organized through the Video Electronic Media Council.

Media Rating Council (MRC)

- Chairman of the Board (1997-1999), chairman of cable committee (1993-1996), board of directors (1991-2007).
- I was the first representative of the cable industry to chair this influential organization, which audits and accredits syndicated research companies including television, radio and print measurement firms.

Cabletelevision Advertising Bureau (CAB)

- Member of the research committee (1991-2007), longtime member of the technical subcommittee which worked with Nielsen and others to maintain the quality of their research procedures and adapt to changing media requirements.

George Foster Peabody Awards

- Board of Directors (2007 to date). The board evaluates entries and determines winners of the Peabody Awards.

Cable and Telecommunications Association for Marketing (CTAM)

- Board of Directors (2006-2007), three-term chairman of the research committee (2003-2006), chairman of conference committee (2002). Member, research committee and special study subcommittees (2006 to date).

Television Association of Programmers-Latin America

- Founding member of the industry trade group that now represents more than 30 pay television channels operating in Latin America (1994-1999).
- Helped structure first region-wide research documenting viewership of international channels in Central and South America.

Testimony

- *In the Matter of Game Show Network, LLC v. Cablevision Systems Corp.*, MB Docket No. 12-122, File No. CSR-8529-P. Before the Federal Communications Commission (Expert Report, October 10, 2011; Reply Declaration, January 16, 2012).
- *VOOM HD Holdings LLC v. EchoStar Satellite LLC*, In the Supreme Court of the State of New York, County of New York (Index No. 600292/08). (Expert Report, February 1, 2010; Deposition Testimony, March 12, 2010 and September 11, 2012).
- *In the Matter of The Tennis Channel, Inc. v. Comcast Cable Communications, LLC*, MB Docket No. 10-204, File No. CSR-8258-P. Before the Federal Communications Commission (Expert Report, January 4, 2010; Supplemental Declaration, March 22, 2010; Deposition Testimony, March 7, 2011; Written Direct Testimony, April 15, 2011; Courtroom Testimony, April 26, 2011).

Honors, Awards

2008 Advertising Research Foundation Lifetime Achievement Award
2007 CableFAX 100 Outstanding Service Award
2007 Advertising Research Foundation Outstanding Service Award
2007 Grammy Award for Best Historical Album, for CD *A Lost Sounds@*
2006 Society for American Music Irving Lowens Award for Distinguished Scholarship in American Music, for book *Lost Sounds: Blacks and the Birth of the Recording Industry*.
2005 ASCAP Deems Taylor Award for *Lost Sounds*
2005 Association for Recorded Sound Collections Award for Excellence for *Lost Sounds*
2004 Association for Recorded Sound Collections Lifetime Achievement Award
2002 Cable and Telecommunications Association for Marketing TAMI Award
2000 Association for Recorded Sound Collections Award for Excellence for *The Columbia Master Book Discography*.
1995: Cable Television Advertising Bureau Jack Hill Award for Excellence and Integrity in Media Research.
1981 San Francisco State University Broadcast Preceptor Award for *The Complete Directory to Prime Time Network and Cable TV Shows*
1980 American Book Award for *The Complete Directory to Prime Time Network and Cable TV Shows*
Biography has appeared annually in *Who's Who in America* since 1990.

Selected Publications, Speeches

- *The Complete Directory to Prime Time Network and Cable TV Shows, 1946-Present* (co-author). Ballantine Books: 1979; 9th Edition, 2007. A standard reference on U.S. television programming, used throughout the industry and by the public. Nine editions and more than half a million copies in print.
- *Lost Sounds: Blacks and the Birth of the Recording Industry, 1890-1919*. University of Illinois Press, 2004. Widely praised, received three national awards, called by the *New York Times* "an act of cultural reclamation."
- *Survey of Reissues of U.S. Recordings*. Council on Library and Information Resources and Library of Congress, 2005. Cited in government copyright-related proceedings.
- *The Complete Directory to Prime Time TV Stars*. Ballantine Books, 1987.
- *Little Wonder Records and Bubble Books* (co-author). Mainspring Press, 2011.
- Numerous articles on television and the music industry in publications including *CASRO Journal*, *Mediafax* (online), *American Music*, *ARSC Journal*, *Popular Music & Society*, *High Fidelity*, *Grove*, *Notes*, others. Some of these articles are on my website.
- Speeches and panels at industry conferences, including those of the Advertising Research Foundation, Cable and Telecommunications Association for Marketing, Radio-TV Research Council, Association for Recorded Sound Collections, Society for American Music, others.

Other Professional Activities

- Adjunct Professor of Communications, C.W. Post Center, Long Island University (1979-1988). Designed courses in Audience Research and TV Program History in degree program.
- Extensively quoted in the trade and general press on television audience matters and on current and especially historical trends. Appearances on *60 Minutes*, *Good Morning America*, *CNN*, *Fox Business News*, *MSNBC*, etc. Quoted in *The New York Times*, *Wall Street Journal*, *Los Angeles Times*, *USA Today*, *Variety*, *Multichannel News*, *Broadcasting & Cable* (profiled in 5/15/00 issue), etc. Since 1979 I have appeared on more than 300 TV and radio talk shows, and conducted seven national media tours on behalf of my books.
- Longtime officer of the Association for Recorded Sound Collections (1979 to date), including President, Conference Chair, committee chair.
- Director of the Historical Recording Coalition for Access and Preservation (2008-date).
- Army Captain, served in U.S. and Vietnam.

Education

- **B.A.**, Economics, Dartmouth College
- **M.S.**, TV-Radio, Syracuse University
- Additional graduate level courses in sociology (degree program), business law, and computer programming.

11-18-12

REDACTED – FOR PUBLIC INSPECTION

Exhibit C

Deposition Transcript Excerpts of Hal J. Singer

REDACTED – FOR PUBLIC INSPECTION

All of the remaining pages of this Exhibit have been designated as Highly Confidential, as provided in the Protective Order in this proceeding, and have been redacted in their entirety.